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Supreme Court of the United States

OCTOBER TERM, 1965/1966

No. 963 67

HELEN MAXINE LEVI TRAVIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 28, 1966
CERTIORARI GRANTED APRIL 18, 1966

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1965~~ 1966

No. ~~963~~ 67

HELEN MAXINE LEVI TRAVIS, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 2]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

February 1963 Grand Jury

No. 32380 CD

UNITED STATES OF AMERICA, Plaintiff,

v.

HELEN MAXINE LEVI TRAVIS, Defendant.

INDICTMENT [8 UNITED STATES CODE § 1185(b)—UNLAWFUL DEPARTURE FROM THE UNITED STATES]—Filed June 21, 1963

The Grand Jury charges:

Count One

[8 U.S.C. § 1185(b)]

That on or about January 22, 1962, at which time there was in force and effect a state of national emergency proclaimed by the President of the United States, Helen Maxine Levi Travis, the defendant herein, then and there being a citizen of the United States, and not being within any of the exceptions contained in the regulations duly issued and promulgated under Section 1185(b) of Title 8, United States Code, to wit: 22 C.F.R. 53.2 and 53.3, at the Los Angeles Airport, Los Angeles, California, within the Southern District of California, did unlawfully, knowingly and willfully depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a

[fol. 3] valid passport is required under the aforesaid regulations.

In violation of Section 1185(b) of Title 8, United States Code.

[fol. 4] **Count Two**

[8 U.S.C. § 1185(b)]

That on or about August 18, 1962, at which time there was in force and effect a state of national emergency proclaimed by the President of the United States, Helen Maxine Levi Travis, the defendant herein, then and there being a citizen of the United States, and not being within any of the exceptions contained in the regulations duly issued and promulgated under Section 1185(b) of Title 8, United States Code, to wit: 22 C.F.R. 53.2 and 53.3, at San Ysidro, California, within the Southern District of California, did unlawfully, knowingly and willfully depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a valid passport is required under the aforesaid regulations.

In violation of Section 1185(b) of Title 8, United States Code.

A True Bill

Everett L. Wilshie, Foreman.

Francis C. Whelan, United States Attorney.

[fol. 5]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

ARRAIGNMENT—July 22, 1963

Defendant is arraigned and states his true name is as set forth in the Indictment.

Court Orders this case continued to August 5, 1963 at 9:30 A.M. for plea.

[File endorsement omitted]

[fol. 6]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

NOTICE OF MOTION TO DISMISS INDICTMENT—
Filed September 9, 1963

To the Plaintiff, the United States of America, and to Francis C. Whelan, Esq., United States Attorney, Southern District of California:

Please Take Notice that on October 7th, 1963, at 2:00 P.M., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Thurmond Clarke, plaintiff will move the above entitled court to dismiss the indictment herein on the grounds that the indictment fails to charge an offense in that:

[File endorsement omitted]

1. There is no legislative authority for prohibiting or regulating travel to Cuba or in any way limiting travel on a geographic basis.

2. To the extent that the statute (8 USC § 1185[b]) purports to authorize the Executive Department to prohibit or regulate travel to Cuba or in any way limit travel on a geographic basis, it delegates legislative power contrary to Article I, Section 8 of the Constitu-
[fol. 7] tion of the United States.

3. As construed and applied herein, to authorize the Executive Department to prohibit or regulate travel to Cuba or in any way limit travel on a geographic basis, the statute (8 USC 1185[b]) is fatally vague contrary to the First and Fifth Amendments to the Constitution of the United States.

4. The statute upon which the indictment rests as here applied deprives defendant of liberty without due process of law and contrary to the Fifth Amendment to the Constitution of the United States in that the factual premises found by the President's Proclamations in 1953 and 1950 (Procl. No. 3004, 67 Stat C 31; Procl. No. 2914, 64 Stat A 454) and upon which the operativeness of the statute depends are not, as of the date alleged in the indictment and the date the indictment was found, true.

5. As construed and applied the statute (8 USC 1185[b]) and the regulations (22 C.F.R. 53.2 and 53.3) upon which the indictment rests deprive defendant of her right to travel contrary to the provisions of the First Amendment to the Constitution of the United States.

Dated at Los Angeles, California, September 9, 1963.

Marcus and McTernan, By: John T. McTernan, Attorneys for defendant, Helen Maxine Levi Travis.

[fol. 8]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 32380 CD

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS INDICTMENT

1. *Preliminary.*

(a) *The Indictment, Statute, Regulations and Proclamations.*

The Indictment is in two counts. Each charges a violation of 8 USC 1185[b] and 22 C.F.R. 53.2 and 53.3, alleging that defendant departed, in January and August, 1962, respectively, from the United States for Cuba ("via Mexico"), the same being a place for which a valid passport is required, without bearing a valid passport. Time for plea has been continued to permit defendant to prepare and file her motion to dismiss.

The provisions of 8 USC 1185[b] are these:

> (b) *Citizens.* After such proclamation [of national emergency] as is provided for in subsection (a) of [fol. 9] this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided for by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter the United States unless he bears a valid passport.

[File endorsement omitted]

The national emergency requisite to the operation of the statute was proclaimed in December, 1950, (sic) in Presidential Proclamation No. 2914 (64 Stat A 454) and Presidential Proclamation No. 3004. (67 Stat C 31). In these proclamations the President made departure and entry of citizens and nationals of the United States from and into the United States "subject to the regulations prescribed by the Secretary of State and published as Sections 53.1 to 53.9 inclusive of Title 22 of the Code of Federal Regulations." These regulations first define the United States for the purposes at hand (Sec. 53.1) and restate the statutory proscriptions on departure from and entry into the United States as so defined (Sec. 53.2) and then state exceptions to the prohibition. (Sec. 53.3). In the last section cited passports are made unnecessary for citizens or nationals of the United States "when traveling between the United States and any country, territory or island adjacent thereto in North, Central or South America, *excluding Cuba.*" [emphasis added] The language referring to Cuba was added to the regulations on January 19, 1961. (26 Fed.Reg. 482).

In short the statute, which in terms requires passports as a condition of departure from or entry into the United States by its citizens and nationals, has been applied so as [fol. 10] to require passports for travel to or from certain areas and none for travel to or from others. The regulations here involved purport to exercise authority to regulate, control or restrict, on a geographic basis, travel by United States citizens and nationals.

At the time that Section 53.3(b), *supra,* was amended to restrict travel to Cuba, the Secretary of State issued Public Notice 179 (26 Fed.Reg. 492) which, *inter alia,* advised that in future passports valid for travel to Cuba must be specifically endorsed for such travel. In another notice [State Department Press Release No. 729, dated December 13, 1962] the Secretary prescribed that such endorsement would be given only in the event the applicant affirmatively showed that his travel might be "regarded as in the best

interests of the United States", such as "newsmen and businessmen with previously established interests." Defendant, neither at the times alleged in the indictment nor thereafter, fell into these categories.

(b) *The gist of the charge.*

From the foregoing review it is evident that, the asserted national emergency having been declared back in 1950 and 1953, 8 USC 1185[b] has been used in 1961 to fashion a prohibition upon travel to or from Cuba by citizens or nationals of the United States. The indictment makes it irrefutably plain that defendant is charged with violating that prohibition. Travel to Cuba is forbidden; travel to Cuba is the alleged offense.[1]

[fol. 11]

2. *There is no legislative authority for prohibiting or regulating travel to Cuba or in any way limiting travel on a geographic basis.*

It is by now established that the right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law. *Kent* v. *Dulles*, 357 U.S. 116, 125; 2 L.ed. 1204, 1210. The societal significance of this liberty ranks with its cognate freedoms under the First Amendment whereby the sovereign people may be vouchsafed access to information needful to the discharge of their function in a representative government. *Kent* v. *Dulles*, 357 U.S. at 126, 127; 2 L.ed.2d at 1210, 1211. The rights

[1] We recognize, of course, that travel to Cuba is not absolutely forbidden. It is possible and permissible with a "specifically endorsed" passport. But for the ordinary citizen whose desire is merely to observe that his views may be "enriched" beyond "what he is told by officials of our government or by a few correspondents of American newspapers" (Chafee, *Three Human Rights in the Constitution of 1781* [1956], quoted in *Kent* v. *Dulles*, 357 U.S. 116, 127; 2 L.ed. 2d 1204, 1211), the proscription is complete. The exercise of such personal liberties does not satisfy the Secretary's standards of serving the national interest.

here involved are "of comparable magnitude" with those of the citizens excluded from their homes and restricted of their freedom of movement in *Korematsu* v. *U.S.*, 323 U.S. 214, 89 L.ed. 194. Thus viewed, these rights may be curtailed only upon a showing of the "gravest imminent danger to the public safety." *Kent* v. *Dulles*, 357 U.S. at 128, 129; 2 L.ed. 2d at 1211, 1212. Thus legislation which would "trench so heavily on the rights of the citizen" as to restrict his freedom of travel is subject to the rule of strict construction. *Kent* v. *Dulles*, 357 U.S. at 129; 2 L.ed. 2d at 1212.

In this branch of the argument, we deal not with the extent to which the Congress may restrict the right to [fol. 12] travel on a geographic basis. Rather are we concerned with whether such authority has been given at all. It is in this context that the rule of strict construction must be applied.

There is nothing on the face of the statute authorizing geographic restrictions upon the right to travel. Its history gives no indication that such a power was ever entertained by those who drafted it. The statute (8 USC 1185[b]) is part of the Immigration and Naturalization Act of 1952, carried therein as Section 215. The Committee Report (H.R. Rep. No. 1356, 82nd Cong., 2d Sess., 1953) says of this provision merely that its language is in practically the same form as predecessor statutes on the same subject. The first of these was the Act of May 22, 1918 (40 Stat. 559) passed during World War I. It required a passport for a citizen to enter or leave the country. It was operative only during the war time and was terminated March 3, 1921. (41 Stat. 1359.) This statute was amended in 1941 to meet the needs of the country during World War II. (55 Stat. 252.) It was invoked by Presidential Proclamation No. 2523, dated November 14, 1941. (55 Stat. 1696), the emergency proclaimed thereby was continued until April 1, 1953, and the statutory provisions were extended until that date as well. (Proc. 2974, 66 Stat. C 31; 66 Stat. 54, 57, 96, 127, 330, 333.) The purpose of the predecessor

legislation was plainly to prevent the crossing of American borders in times of war, for the purpose of committing such crimes as espionage, disaffection in the armed forces and related activities, including the transfer of important military information on the country's war effort. These objectives are made plain in the report of the House Foreign Affairs Committee on the 1918 bill (H.R. Rep. No. 485, 65 Cong. 2d Sess., 2, 3.) The Senate report on the 1941 legislation was to similar effect. (S. Rep. No. 444, 77 Cong. 1st Sess., 1, 2.) The congressional debates are [fol. 13] consistent with this statement of purpose. (87 Cong.Rec. 5048-5053, 5386-5388.) As was pointed out by the minority in *Kent, supra,* the effect of the 1918 and 1941 legislation was a complete change in the emphasis of passport function from that of affording protection to the individual holder to safeguarding the security of the country. (357 U.S. at 137, 2 L.ed. 2d at 1216.)

The enactment of 8 USC 1185[b] in language virtually identical with the earlier statutes and against their background of purpose, *and without any observations in the Committee's report indicating a different or enlarged purpose,* would seem to afford strong basis for the conclusion that Congress intended by the present statute no greater or different control over the travel of American citizens and nationals than it had authorized in the past.

This conclusion takes greater force from the observations of the majority in *Kent, supra,* to the effect that the power actually exercised by the Secretary over passports had been used quite narrowly. It was there observed that passport refusals had fallen into two categories: (a) refusals based upon the non-citizenship or non-allegiance of the applicant to the United States (this based upon 22 USC 212 limiting passports to those "owing allegiance, whether citizen or not, to the United States"); and (b) the applicant's participation in unlawful conduct, his efforts to escape the law, promoting passport frauds, or otherwise engaging in conduct violating the laws of the United States.

In short, nowhere in the history of legislation affecting the issuance or refusal of passports has there been either

in statutory language, administrative regulations or administrative practice any use of these powers to restrict travel on a geographic basis. The statute here involved, then, is found in a setting completely alien to the notion [fol. 14] of geographic restriction upon the right to travel. So far as our research has enlightened us, in the nearly half century since the passage of the 1918 statute, there has been no effort, by prosecution or otherwise, to declare areas of the world out of bounds to citizens or nationals of the United States. This effort has arisen only since 8 USC 1185[b] has, by virtue of the 1961 amendment to the Secretary's Regulations, been enlisted to implement our political differences with the Republic of Cuba.

In view of the importance of the right to travel here involved, the rule of strict construction imposed by the *Kent* decision requires that the statute be read as not conferring the power which the Secretary here would exercise.

3. *To the extent that the statute (8 USC 1185[b]) purports to authorize the Executive Department to prohibit or regulate travel to Cuba or in any way limit travel on a geographic basis, it delegates legislative power contrary to Article I, §8 of the Constitution of the United States.*

Obviously the Secretary in promulgating 22 C.F.R. 53.3(b) relies upon the language in 8 USC 1185[b], which reads, "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe." Plainly this language, read alone or in context of the full provision, is devoid of any standards whatever for the exercise of the President's powers here delegated to the Secretary. Specifically, the language will be searched in vain for any standards by which a power to limit the right to travel on a geographic basis can be derived.

In *Schechter* v. *United States*, 295 U.S. 495, 79 L.ed. 1570, and *Panama Refining Company* v. *Ryan*, 293 U.S. 388, 79 L.ed. 446, the statutes involved made elaborate declarations as to the national emergency which unquestionably [fol. 15] existed. In addition, the statutes and regulations

involved in those cases related exclusively to matters of business, not to the exercise of First Amendment rights. Nevertheless, the broad authority found by the courts to have been given to the President was held to constitute an unlawful delegation of authority. In the *Panama Refining* case, Chief Justice Hughes stated:

> "• • • It gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment." (*Id* at 415.)

and

> "If the Congress can make a grant of legislative authority of the sort attempted by section 9(c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose . . ." (*Id* at 420.)

This last passage is particularly applicable to the present case where it was not the President but the Secretary of State who declared what conduct was to be made illegal.

The regulations here under attack—if they can be deemed to have the support of the Statute—must fall under Mr. Justice Cardozo's statement in *Schechter* v. *United States*, *supra*, at 551:

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and [fol. 16] vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 440."

In the *Kent* case, *supra*, the Secretary argued that the power delegated was in the field of foreign affairs, and that therefore the standards need not be as precise as in other

fields. Presumably the government will make the same argument here. To that offer we would offer the Supreme Court's answer in *Kent:*

> "* * * If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 420-430. Cf. *Cantwell* v. *Connecticut,* 310 U.S. 296, 307; *Niemotko* v. *Maryland,* 340 U.S. 268, 271. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo,* 323 U.S. 283, 301-302. Cf. *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 156; *United States* v. *Rumely,* 345 U.S. 41, 46. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen." (*Kent* v. *Dulles,* supra, at 129).

In addition it cannot be argued that a vague standard rather than a precise one would suffice here, because there [fol. 17] is *no* standard prescribed by the statute, vague or precise. Further, the power exercised in the instant case is not the power over foreign affairs but the power over internal security.

This is not a case involving the negotiation of treaties or other executive action in the field of foreign relations. This case involves private rights and personal liberties. Since the exercise of these rights and liberties is here claimed to be criminal, this court will even more carefully than usual scrutinize the standards relied on. If they were inadequate by the approach laid down in *Kent* v. *Dulles, supra, a fortiori* they are inadequate in this criminal proceeding.

4. *As construed and applied herein, to authorize the Executive Department to prohibit or regulate travel to Cuba,*

or in any way limit travel on a geographic basis, the statute (8 USC 1185[b]) is fatally vague contrary to the First and Fifth Amendments to the Constitution of the United States.

We deal again with the same language in 8 USC 1185[b] pertaining to the exceptions and limitations which the President may make to the broad proscription of that statute. On its face, the statute prohibits departures and entries without passports with unspecified and unparticularized exceptions. The very absence of standards prevents the citizen from knowing what departures or entries, to what places or from what places, and under what conditions, are either permitted or prohibited.

To construe a statute making entry and exit illegal without a passport, so that it becomes illegal to travel to particular countries, is to make the statute constitutionally deficient for vagueness. The use of a term that is so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* [fol. 18] v. *General Construction Company*, 269 U.S. 385, 391; 70 L.ed. 322, 328; see also *Small* v. *American Sugar Refining Company*, 267 U.S. 233, 238-240; 69 L.ed. 589, 593-594. The vagueness of the regulations is especially pernicious where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, 343 U.S. 495: 96 L.ed. 1100; *Winters* v. *New York*, 333 U.S. 507; 92 L.ed. 840; *Niemotko* v. *Maryland*, 340 U.S. 268; 95 L.ed. 267; *Kunz* v. *New York*, 340 U.S. 290; 95 L.ed. 280.

5. *The statute upon which the indictment rests as here applied deprives defendant of liberty without due process of law contrary to the Fifth Amendment to the Constitution of the United States in that the factual premises found by the President's Proclamations in 1953 and 1950 (Procl. No. 3004, 67 Stat C 31; Procl. No. 2914, 64 Stat A 454) and upon which the operativeness of the statute depends are not, as of the date alleged in the indictment and the date the indictment was found, true.*

The Secretary's actions in implementing the 1952 Immigration and Nationality Act are based upon Presidential Proclamation No. 2914 and No. 3004 (*supra*). No. 2914 (Dec. 16, 1950, 64 Stat A 454) opens in the following manner:

> "WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict;"

While there is general reference to "world conquest by Communist imperialism" and the importance of protecting the basic liberties of American citizenship of "reading and listening to what they choose, the right of free speech including the right to criticize their government," it is plain [fol. 19] that this proclamation is bottomed upon the Korean War. *Ibid.*

Three years later, on January 17, 1953, following the passage of the McCarran Act, Presidential Proclamation No. 3004, *supra,* was passed upon the basis that "the national emergency, the existence of which was proclaimed on December 16, 1950 by Proclamation 2914, still exists."

Whatever may have been the situation in 1950 and 1953, clearly that situation does not exist today. The Korean War, which was the explicit occasion for the invocation of travel controls, ended in 1953. There is, therefore, no rational basis for the interference with the basic right of movement upon the basis of an emergency no longer in existence.

It is true that serious controversies have arisen in the relationship between the Cuban Government and the United States Government. These have resulted in executive orders imposing controls over exports and imports, the establishment of blacklists and embargoes, and other measures, taken by the Government of the United States.[2] But it is sig-

---

[2] See, e.g., cut in Cuban sugar quota, Presidential Proclamation No. 3355 (July 7, 1960, 25 Fed.Reg. 6414) and supplemental

nificant that none of these measures asserts the existence of a national emergency, and that no proclamation has ever [fol. 20] issued under § 215 declaring that with respect to Cuba there is a national emergency.

The Government of Cuba, despite the breach in diplomatic relations, is still recognized by the Government of the United States. The calendars of state and federal courts are filled with litigation involving governmental agencies of the Republic of Cuba, sometimes as plaintiffs, sometimes as defendants. See, for example, *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845 (CA 2, 1962), cert. granted, 83 Sup. Ct. 717.

This court is not bound by a decade-old declaration of a national emergency which is inapplicable to the present situation and no longer exists. It has the authority to inquire as to whether there is in fact such a national emergency in existence today which can support this restriction upon civil liberty. In *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, 89 L.ed. 207, Mr. Justice Holmes stated with respect to an emergency declaration by a legislature that,

> "* * * [A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . And still more obviously so far as this declaration looks to the future it can be no more prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. . . ." (*Id.* at 547-548.)

Presidential Proclamations No. 3383 (Dec. 19, 1960, 25 Fed.Reg. 13131); No. 3401 (April 4, 1961, 26 Fed.Reg. 2849); No. 3440, Dec. 5, 1961, 26 Fed.Reg. 11741); complete embargo on trade with Cuba, Presidential Proclamation No. 3447 (Feb. 6, 1962, 27 Fed. Reg. 1085); prohibition of assistance of Cuba and to any countries furnishing assistance to Cuba, Pub.L. 87-195, Pt. III, §620, Sept. 4, 1961, 75 Stat. 444, amended Pub.L. 87-565, Pt. III, §301(d), Aug. 1, 1962, 76 Stat. 260; quarantine on delivery of offensive weapons to Cuba, Presidential Proclamation No. 3504 (Oct. 24, 1962, 27 Fed. Reg. 10501).

In that case, the Court held that, had the case revolved around the existence of the emergency at the time of its consideration by the Supreme Court, it would have taken [fol. 21] judicial notice of the fact that there no longer existed in the District of Columbia a housing emergency sufficient to validate the Rent Control Act of 1919, as successively reenacted. It remanded the case to the trial court for a determination of the facts because the existence of the emergency at different times was deemed material.

In *East New York Savings Bank* v. *Hahn*, 326 U.S. 230, 90 L.ed. 34, Mr. Justice Frankfurter, in upholding the constitutionality of the 1943 extension of New York State's Moratorium Law, distinguished *Chastleton* as dealing with "quite a different situation." (*Id.* at 235.) The difference lay in the care and frequency with which the legislature had renewed the law from time to time, and adjusted its terms, based in each case on a full investigation of the facts:

> "The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts. . . ." (*Id.* at 234-235; see also *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 433, 78 L.ed. 1344, 1347.

In *Woods* v. *Miller*, 333 U.S. 138, 147, 92 L.ed. 596, 604, Mr. Justice Jackson's concurring opinion upholding federal rent control in 1948 denied, however, that "war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended."

The Court of Appeals for the Ninth Circuit, in a recent opinion upholding the judicial power to look behind a presidential declaration of national emergency relating to the possession of gold bullion, made an observation even more [fol. 22] striking in its applicability to personal liberties:

"It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic democratic revolution and the struggle to preserve a balanced way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence. Executive regulations drafted and confirmed for an emergency should expire with the emergency. There will be time enough to revivify these if another emergency require and Congress be willing. Of course, if it seems essential to continue the subject matter of these criminal regulations now, Congress can so declare. But the power lies in Congress." (*Bauer* v. *United States*, 244 F. 2d 794, 797.)

The lapse of time since the issuance of the proclamations here, together with the judicially noticeable matters set out in this branch of the argument, render the proclamations presumptively inoperative. Surely the changing kaleidoscopes of international relations and political maneuvers are not the sort of fact situations entitled to any presumption of continuance. Indeed, just the opposite of such a presumption would seem required. See, e.g. *Maggio* v. *Zeitz*, 333 U.S. 56, 92 L.ed. 476; *Colt* v. *United States*, 158 F. 2d 641 (CA 5; 1946); *United States* v. *Patterson*, 219 F. 2d 659 (CA 2, 1954).

In the event that the Court will not declare the proclamations ineffective upon the showing and argument here presented, request is hereby made for a hearing at which defendant will have full opportunity to present evidence that the declared emergency does not in fact exist.

6. *As construed and applied, the statute (8 USC 1185[b])* [fol. 23] *and the regulations (22 C.F.R. 53.2 and 53.3) upon which the indictment rests deprive defendant of her right to travel contrary to the provisions of the First Amendment to the Constitution of the United States.*

The societal significance of the right to travel has been delineated in the *Kent* opinion, *supra*. The assertion of executive power to place areas of the world and their experiments with different politico-economic systems off limits to the American electorate seems a particularly grave thrust at this great liberty. If as was once asserted First Amendment freedoms "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (*Thornhill* v. *Alabama*, 310 U.S. 88, 102; 84 L. ed. 1093, 1102), they present themselves with an irresistible imperative here. Today our differences with Cuba are presented in a context of international conflict. Our national policy has been declared to treat Cuba as a pariah of the hemisphere and to be ready for armed conflict. Our President has openly offered moral, and impliedly offered material, support to those who would resort to war and invasion for the overthrow of the Cuban Government. There may be many in our citizenry who are not ready to lay down American lives for the right of Cuban emigres to march down the streets of Havana. Before such a perilous course is adopted, our people have a right to be informed, to see for themselves. Of even greater importance, the international contacts thus made can lead to understanding, to a basis for resolving conflict, to peace. Whether or not one can accept the present policies of our government toward Cuba, the demands of the First Amendment are that the people must be free to find for themselves the underlying facts and form for themselves their own opinions. It is a travesty [fol. 24] of representative government to enable its officials to fix policy and deny the people the opportunity to take their own look at the facts. When this denial carries the possibility of war waged without the knowing consent of the people, the travesty upon the premises of free government is complete.

Respectfully submitted,

Margolis and McTernan, By John T. McTernan, Attorneys for Defendant, Helen Maxine Levi Travis.

[fol. 25]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. CD 32380 Criminal

[Title omitted]

WAIVER OF DEFENDANT'S PRESENCE [RULE 43 FED. R. CR. PROC.]—Filed September 30, 1963

The undersigned defendant hereby waives the right to be present in person in open court upon the hearing of any motion or other proceeding in this cause, including when the case is ordered set for trial, when a continuance is ordered, and when any other action is taken by the court before, during or after trial, except upon arraignment, plea, empanelment of jury and imposition of sentence.

The undersigned defendant hereby requests the court to proceed during every absence of his which the court may permit pursuant to this waiver; and hereby agrees that his interests will be deemed represented at all times by the presence of his attorney the same as if the defendant himself were personally present in court; and further agrees to be present in person in court ready for trial any day and hour which the court may fix in his absence.

9/28/63

Helen Maxine Levi Travis, Defendant, 6324 Primrose Avenue, Los Angeles 28, California.

Approved 9/25/63

Margolis and McTernan, by John T. McTernan, Attorney for Defendant.

[File endorsement omitted]

[fol. 26]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

PLEA—September 9, 1963

Defendant pleads Not Guilty as to both counts of the indictment.

Court Orders case transferred to the calendar of Judge Crary for all further proceedings.

[File endorsement omitted]

[fol. 27]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRY OF HEARING OF CASE—September 3, 1963

Defendant is present with counsel and states defendant desires to file a motion to dismiss and counsel estimate hearing on said motion to take ½ to 1 hour to argue.

Court Orders hearing of said motion to dismiss be heard October 7, 1963 at 2 P.M. If defendant's motion to dismiss is denied the court will set the case for trial upon ruling on defendants motion to dismiss.

[File endorsement omitted]

[fol. 28]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

OPPOSITION TO MOTION TO DISMISS THE INDICTMENT —Filed October 8, 1963

Plaintiff, the United States of America, opposes defendant Travis' Motion to Dismiss the Indictment on the following grounds:

1. There is legislative authority for regulating travel to Cuba.

2. Section 1185(b) of Title 8, United States Code, is not an unconstitutional delegation of legislative power.

3. The Statute and the Regulations are not void for vagueness.

4. There is still in existence a national emergency.

5. The Statute and the Regulations do not unconstitutionally deprive defendant of her right to travel.

Respectfully submitted,

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section.

[File endorsement omitted]

[fol. 29]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

I

Preliminary Statement

On June 27, 1952, Congress enacted the Immigration and Nationality Act (66 Stat. 163), and in so doing Congress authorized the President to impose "restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States." (66 Stat. 190, 8, U.S.C. 1185a).

The Act has a condition precedent to imposing "restrictions and prohibitions": the United States being at war *or* during the existence of any national emergency proclaimed by the President; and there is a condition subsequent in order to make such "restrictions and prohibitions" effective: that these "restrictions and prohibitions be publicly proclaimed." The Act also provides that such "restrictions and prohibitions" shall be effective "until otherwise ordered by the President or the Congress."

[fol. 30] On December 16, 1950, President Truman proclaimed the existence of a national emergency (64 Stat. A454, Proclamation No. 2914); this is the condition precedent to the President imposing "restrictions and prohibitions" on travel.

On January 17, 1953, President Truman executed Proclamation No. 3004 for the Control of Persons Leaving Or Entering The United States in which he specifically found:

that the existence of the national emergency which he proclaimed (No. 2914) on December 16, 1950 were still in existence; and that the exigencies of the international situation and of the national defense require the imposition of restrictions and prohibitions upon travel in addition to those otherwise provided by law. (67 Stat. C31, 18 Fed. Reg. 489).

In pertinent part, Proclamation No. 3004 provides:

"• • • I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of Title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations and orders with respect thereto:

"1. The departure and entry of citizens and nationals of the United States from and into the United States including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and pub- [fol. 31] lished as sections 53.1 to 53.9, inclusive, of Title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require. • • •"

Title 22, Code of Federal Regulations, Part 53, Travel Control of Citizens and Nationals In Time of War or National Emergency comprise the regulations applicable to this case.

On January 19, 1961, 22 C.F.R. 53.3(b) was amended to exclude Cuba from the list of places that one may travel to without a passport; or to put it another way, the effect of this amendment is to require a valid passport issued by the Secretary of State in order to travel to Cuba (unless the individual falls within an exception enumerated in 53.3 which is not applicable here).

On April 5, 1958, §53.8 was reinstated, and it provides:

> "§53.8 Discretional exercise of authority in passport matters. Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries."

Defendant was indicted on June 26, 1963 in two counts charging her with departing from the United States to Cuba without bearing a valid passport on January 22, 1962 and on August 18, 1962.

[fol. 32]

II

Summary of Argument

Defendant urges this Court to dismiss the indictment because:

1. There is no legislative authority for prohibiting travel to Cuba;

2. The statute and regulations are an unlawful delegation of legislative power;

3. The statute is void for vagueness;

4. There is no national emergency still in existence today;

5. The statute and the regulations deprive defendant of her constitutional right to travel.

The plaintiff shall and does rely on *Worthy* v. *Herter*, 270 F.2d 905 (D.C. Cir. 1959), cert. den. 361 U.S. 918, as being dispositive of defendant's motion to dismiss.

III

There Is Legislative Authority for the Prohibition of Travel to Cuba.

Congress authorized the President to impose restrictions and prohibitions on travel under certain conditions. The conditions were met. The President imposed the restrictions and prohibitions.

Defendant argues that there is nothing on the face of the statute authorizing geographic restrictions on travel. Plaintiff points out that the statute authorizes restrictions and prohibitions on travel, without defining the kind of prohibition or restriction; and suggests that the most natural restriction or prohibition of travel is one based upon geography.

Worthy v. *Herter, supra,* is a complete answer to this proposition.

Porter v. *Herter,* 278 F.2d 280 (D.C. Cir. 1960) held that the geographical limitations imposed upon a Congressman's passport were valid.

[fol. 33] See also *Frank* v. *Herter,* 269 F.2d 245 (D.C. Cir. 1959), cert. denied 361 U.S. 918.

IV

The Statute (8 U.S.C. 1185(b)) Is Not an Unlawful Delegation of Legislative Power

The gist of defendant's argument on this point is the lack of any standards whatsoever for the exercise of the power to restrict or prohibit travel delegated by Congress to the President.

The only ascertainable standard in the statute is that if "the President shall find that the interests of the United States require" additional restrictions and prohibitions on travel; then he may impose them.

Defendant relies on *Schechter* v. *United States*, 295 U.S. 495 (1935) which dealt with the National Industrial Recovery Act's delegation to the President to approve of "codes of fair competition" in interstate commerce; and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), which dealt with the National Industrial Recovery Act's delegation to the President to regulate interstate and foreign commerce of petroleum.

The present statute deals with foreign affairs, and the law is clear that the President's conduct of the foreign affairs of our nation is not reviewable by the judiciary.

Judge Prettyman, in *Worthy* v. *Herter, supra*, page 913 said:

> "Judgment on what course of action will best promote our foreign relations has been entrusted to the President, not to the courts, journalists, scholars, or even 'public opinion.' He makes his decision with the aid of the Department of State, a large organization with stations throughout the world, as well as on the basis of information received from all other parts of [fol. 34] the Executive Branch. We, if we had all this information, might reach a different decision. But the Constitution has wisely placed that burden in the hands of one who must justify his decisions before the Electorate."

There are excellent practical reasons for the Constitutional separation of powers in regard to the Chief Executive's control over the conduct of international affairs. As stated by Justice Jackson in *Chicago and Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948):

> "But even if courts could require full disclosure [of confidential executive material], the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the Government, Executive and Legislative. They are delicate,

complex, and involve large elements of prophesy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong to the domain of political power not subject to judicial intrusion or inquiry. Coleman v. Miller, 307 U.S. 433, 454; United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-321; Oetjen v. Central Leather Co., 246 U.S. 297, 302."

In accord with the classic rule that the courts will not interfere in the conduct of international relations by the Chief Executive are *Z. & F. Assets Realization Corp.*, v. *Hull,* 144 F.2d 464, 469 (D.C. Cir. 1940), aff'd 311 U.S. 470 (1941), and *Rocha* v. *United States,* 288 F.2d 545, 549 (9 Cir. 1961) cert. den. 366 U.S. 948 (1961).

[fol. 35] In 1936, the year after the *Schechter* and *Panama Refining* cases, the Supreme Court was again called upon to strike down legislation as being an unlawful delegation of legislative power to the President, but this time the legislation dealt not with internal affairs of the nation, but with foreign affairs, and the Court in holding that there was no unconstitutional delegation of legislative power to the Executive, said:

"Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it....

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment [fol. 36] —perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. . . .

"When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. . . ." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-321 (1936).

It is also noteworthy that the legislation being considered in this case authorized the President to impose restrictions and prohibitions on a geographical basis. The decision also

reviews many other enactments of a similar nature that validly support the plaintiff's position.

[fol. 37]

V

The Statute and the Regulations Are Not Void for Vagueness.

In *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951), the Supreme Court said at page 230:

> "The essential purpose of the 'void for vagueness doctrine' is to warn individuals of the criminal consequences of their conduct. *Williams* v. *United States*, 341 U.S. 97, . . . *Screws* v. *United States*, 325 U.S. 91, 103-104 (1945)."

We submit that 8 U.S.C. 1185(b) is a lucid warning of the fact that if a citizen of the United States departs from the United States without bearing a valid passport then criminal consequences may ensue.

VI

The National Emergency Declared by the President Is Still in Existence.

Defendant's argument on this point is bottomed on the proposition that the declaration of national emergency operative herein (No. 2914 as recognized in No. 3004) was based solely upon the war powers; and this is not true.

In the proclamation of national emergency, No. 2914, President Truman premised his declaration not only on "recent events in Korea and elsewhere", but also on the threat of "world conquest by communist imperialism", and "the increasing menace of the forces of communist aggression."

We note also that 8 U.S.C. 1185 provides, "When the United States is at war or during the existence of any national emergency proclaimed by the President" which is an obvious indication of Congressional recognition of national emergencies other than war.

[fol. 38] In *Worthy* v. *Herter, supra,* pages 910-911, Judge Prettyman in recognizing the foreign relations power as a basis for the national emergency, said:

> "We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The bare determination that certain areas outside this hemisphere are trouble spots, or danger zones, is a phase of 'foreign affairs'. Such a determination involves information gleaned through diplomatic sources and channels, and a judgment premised in large part upon foreign policy. The grounds upon which the President would make such a designation are foreign considerations, foreign affairs and policy. Indeed it would seem that such a restriction is in and of itself a foreign policy. It is at least an instrument of foreign policy. . . .
>
> ". . . The essence of the conduct of foreign affairs is the maintenance of peace, the prevention of war. The Constitution places that task of prevention in the hands of the Executive. The two correlative powers, to conduct war and to prevent war, are Executive functions under our Constitution. . . .
>
> "We think that, if the Executive foresees that the presence of American citizens in a designated foreign area may, by reason of military or political conditions there, evolve into, or be the occasion of, a clash, diplomatic or military, with a foreign government, his power in respect to foreign affairs includes power to refuse to sanction the travel of American citizens in that area. To hold the contrary would be to hold that the protec-
> [fol. 39] tion of the peace against American-caused incidents in foreign countries is outside the realm of foreign affairs. Such latter holding would be both illogical and unrealistic. . . ."

It is also noteworthy that the statute (8 U.S.C. 1185) reserved to Congress the power to declare that the additional

"restrictions and prohibitions" imposed by the President are now null and void where it provides that it shall be unlawful to engage in such prohibited conduct "until otherwise ordered by the President or the Congress."

Defendant asks this court to declare the presidential proclamations ineffective at this time. Has the court the power to do so? What is the scope of judicial review over the President's constitutional power to conduct the foreign affairs of the nation?

Judge Prettyman in *Worthy* v. *Herter, supra,* page 911, reviewed the authorities and then said:

> "It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs."

The continued existence and recognition of this same national emergency has been noted by Congress and by Presidents Eisenhower and Kennedy.

In March of 1958, the House Judiciary Committee, interested in "Provisions of Federal Law presently in effect by reason of the national emergency proclaimed by the President December 16, 1950", reported on the provisions of law "in effect by reason of this national emergency," and in the "Foreword", Chairman Emanuel Celler explained that:

> "the change in the international position of the United States since the end of World War II, the cold war, [fol. 40] the Korean episode, have all made it necessary to continue in force many of these temporary statutes. It is largely for that reason that today, almost 5 years after the signing of the Korean armistice, the national emergency proclaimed to meet that situation is still in effect".

On November 29, 1960, President Eisenhower issued Executive Order No. 10896 (3 C.F.R. (1960 Supp.) 89) in

which he proclaimed, "the continued existence of the national emergency proclaimed by Proclamation No. 2914." See also Executive Order 10995 (3 C.F.R. (1961 Supp.) 74).

On January 25, 1962, the House Judiciary Committee issued a new committee report on the "Provisions of Federal Law in effect in time of national emergency," and Chairman Celler in the "Foreword" said:

> "The emergency proclaimed by the President in 1950 had not yet been terminated and the chronic state of international tensions made it clear that it would not be terminated in the foreseeable future."

On July 24, 1962, President Kennedy issued Executive Order No. 11037 in which he noted, "the continued existence of the national emergency proclaimed by Proclamation 2914 of December 16, 1950." (3 C.F.R. (1962 Supp.) 230).

VII

The Statute and the Regulations Do Not Unconstitutionally Deprive Defendant of Her Right to Travel

This point is completely refuted in the lucid opinion of Judge Prettyman in *Worthy* v. *Herter, supra.*

[fol. 41]

VIII

Conclusion

Defendant's Motion to Dismiss the Indictment should be denied.

Respectfully submitted,

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section, Attorneys for Plaintiff United States of America.

[fol. 42] Certificate of Service by Mail (omitted in printing).

[fol. 43]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRY SETTING MOTION TO DISMISS FOR HEARING —October 14, 1963

Attorney Finkel appears for attorney McTernan and moves for continuance and states grounds therefor. Court grants said motion and orders hearing of defendant's motion to dismiss continued to October 21, 1963 at 11 A.M.

[File endorsement omitted]

[fol. 44]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

DEFENDANT'S REPLY TO OPPOSITION TO DEFENDANT'S MOTION TO DISMISS—Filed October 18, 1963

We respond *seriatim* to the points covered by the Government in its opposition. These points related in their subject matter and order to those urged by defendant in support of her motion.

1. ***Whether there is legislative authority for the prohibition upon travel to Cuba.***

The Government concedes (p. 5, lines 22-24) that the statute does not define "the kind of prohibition or restric-

[File endorsement omitted]

tion" on travel which it authorizes. While in the context of this case it might seem to the Government counsel in this case that "the most natural restriction or prohibition" is one "based on geography" (p. 5, lines 25, 26), it might as easily be thought to be natural to base the limitation on the traveler's politics (cf. *Kent* v. *Dulles*, 357 U.S. 116, 2 L.ed.2d 1204) or his involvement in wartime espionage or his being a fugitive or his acting in the interests of a [fol. 45] government with which we are at war. (See, e.g., Report on 1941 predecessor statute, S. Rep't No. 44, 77th Cong., 1st Sess., pp. 1, 2; 87 Cong. Rec. 5048-5053, 5386-5388; see also Report on 1918 predecessor statute, H.R. Rep't No. 485, 65 Cong., 2d Sess., pp. 2, 3.) Plainly the statute is ambiguous as to what kinds of restrictions and prohibitions it empowers the executive to impose. Since the statute trenches upon a particularly sensitive First Amendment right, the rule of strict construction applies. *Kent* v. *Dulles*, 357 U.S. at 129, 2 L.ed.2d at 1212. Invoked in a criminal proceeding, the rule of strict construction applies for a second independent and reinforcing reason. See, e.g., *Winters* v. *New York*, 333 U.S. 507, 92 L.ed. 840 (1948).

In *Kent* v. *Dulles*, *supra*, the Supreme Court refused to construe this statute so as to find a power to abridge the freedom to travel for reasons of the individual's ideology. This, because of the "large social values" that inhere in freedom of movement. (357 U.S. at 126, 2 L.ed.2d at 1210.) Here freedom of movement is to be abridged for reasons of geography, and the thrust is directly upon what the individual desires to see and hear, his opportunity to learn from more than official "news" handouts about countries which have a radically different approach to the same problems we have, poverty, hunger, disease, ignorance. The rule of strict construction no more permits this abridgement than the one attempted in *Kent*, *supra*.

Moreover, the Government has failed to answer our argument on the legislative history. Here a concededly

vague statute was enacted in a context of antecedent legislation that had been used to restrict travel only for reasons of "citizenship or allegiance on the one hand or . . . criminal or unlawful conduct on the other." (*Kent* v. *Dulles*, 357 U.S. at 128, 2 L.ed.2d at 1211.) The present statute, in terms virtually identical with its predecessors, was enacted without Congressional indication of intent to [fol. 46] enlarge or change the scope or objectives of the executive's power. The earlier statutes having been confined to the purposes just indicated, there is every reason to conclude that the present statute was similarly intended to be so limited. This reading of 8 USC 1185(b) seems to have been finally determined in *Kent* where the Court said that the reasons for restriction applied under the earlier statutes "are the only ones which it could fairly be argued were adopted." (357 U.S. at 128, 2 L.ed.2d at 1211.)

2. *Whether the statute delegates legislative powers.*

The Government's position here is that the executive's conduct in proscribing travel to Cuba is in the area of foreign affairs and is "not reviewable by the judiciary." (p. 6, lines 20-22.) The very authorities cited by the Government show that the rule is that executive actions that rest upon a "political" judgment are beyond judicial review because their basis is outside the competence of the judicial process. This point is explicitly and fully stated in the majority[1] opinion in *Chicago & S. Air Lines* v. *Waterman SS Corp.*, 333 U.S. 103, 92 L.ed. 568 (1948). The language is quoted by the Government. (p. 7, lines 9-27.) It was even more comprehensively stated in *Coleman* v. *Miller*, 307 U.S. 433, 83 L.ed. 1385, where the Court was confronted with the question whether the child labor amendment had been ratified by the requisite number of States within a "reasonable time" of its proposal by the Congress.

[1] The case was decided 5 to 4. Of the tribunal as then constituted only two of the dissenters are in today's Court.

The Court refused to pass on this question because it was political and beyond the judicial competence:

"Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question [fol. 47] petitioners' counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years had been used by the Congress as a reasonable period; that one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that 'the nature and extent of publicity and the activity of the public and of the legislatures of the several States in relation to any particular proposal should be taken into consideration.' That statement is pertinent, but there are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of decid-

ing a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The ques- [fol. 48] tions "they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment." (307 U.S. at 453-453; 83 L.ed. at 1396.)

But here we deal with no political decision in the sense of these cases. As in *Kent* v. *Dulles*, we deal with the First Amendment right to travel and with freedom of exit, a "liberty" embraced within the Fifth Amendment's protection. Here the executive has no "unbridled discretion." "[T]here is more involved here" than "political questions entrusted to the Chief Executive by the Constitution." (*Kent* v. *Dulles*, 357 U.S. at 129, 2 L.ed.2d 1212.) To regulate the liberty involved here the executive must act "pursuant to the law-making functions of the Congress." And if the latter delegates power to the executive "the standards must be adequate to pass scrutiny by the accepted tests. See Panama Ref. Co. v. Ryan, 293 U.S. 388, 420-430, 79 L.ed. 446, 458-464. . . ." (Idem) Moreover, any delegated powers that curtail or dilute this liberty "we will construe narrowly." (Idem.)

This concept is not new. In *Perez* v. *Brownell*, 356 U.S. 44, 2 L.ed. 2d 603 (1959), the statute under review provided for the automatic denaturalization of citizens on the basis of their conduct in foreign countries. The statute was held to be an exercise by the federal government of its power to regulate foreign affairs. This power was there said to be an inherent power of sovereignty not resting upon a specific delegation in the Constitution. Nevertheless such power was held to be subject to the same restrictions, judicially interpreted and applied, as the exercise of the

expressly delegated power. (356 U.S. at 57, 58; 2 L.ed.2d at 613.) In *United States* v. *Curtiss-Wright Export Corp.*, 290 U.S. 304, 81 L.ed. 255 (1936), the inherent sovereign power of both Congress and the President in matters of [fol. 49] foreign affairs were held to be subordinate to the "applicable provisions of the Constitution." (290 U.S. at 320, 81 L.ed. at 262.) There a delegation of power to the President in foreign affairs matters was involved. In the final analysis the Court did find a statutory standard guiding the President's action and upheld the statute and the Presidential action thereunder. (290 U.S. at 329, 81 L.ed. at 262.)

The Government's argument proves too much. For if all executive action in "foreign affairs" were free of judicial review and all delegation of power in this field relieved of the requirement for standards guiding his action, we would have the very "unbridled discretion" which the Supreme Court refused to tolerate in *Kent* v. *Dulles, supra.* Upon such a doctrine as the Government here advances, citizens could be subjected to arbitrary controls and disabilities imposed by executive fiat, undertaken on executive initiative alone, and answerable to no authority. There is of course a large area of "foreign affairs" where the executive is made answerable only to the electorate. It includes making various forms of international agreements, compacts and conventions (see *United States* v. *Belmont,* 301 U.S. 324, 330, 331), recognizing foreign governments (see *Oetjen* v. *Central Leather Co.,* 246 U.S. 297; *United States* v. *Belmont,* supra), conducting embargoes and similar activities short of actual hostilities (see *United States* v. *Curtiss-Wright Export Corp.,* 290 U.S. at 322-325). But the law is plain, we submit, that this "unbridled" power does not extend to depriving citizens of First and Fifth Amendment liberties. These reach too intimately into the very structure and functioning of a free society.

If the decision in *Worthy* v. *Herter,* 270 F.2d 905 (CA, DC, 1959) holds to the contrary, we respectfully submit

that it is erroneous. It may be that *Worthy* can be distinguished from the case at bar because there an applicant was denied a passport, while here a citizen is criminally prosecuted for having traveled without one. If, as is usual [fol. 50] in criminal cases, stricter standards of statutory or executive proscription and narrower construction of statutory and regulatory language are required, it is possible to say that the denial of passport in *Worthy* could stand side by side with dismissal of the prosecution here. But the main thrust of the *Worthy* opinion is that the executive had an inherent as well as a legislative power to mark areas of the world off limits as part of the power to regulate foreign affairs, and that this power is subject to no legal or constitutional restriction judicially imposed. While there can be no question that the issuance of passports to American citizens and their travel abroad raises questions of "foreign affairs," this is but the beginning, not the end of the problem. To the extent that governmental action impinges upon citizens' rights, it is subject to constitutional limitation and judicial review. Whatever may have been the effect of the denial of passport in *Worthy*, there can be no question here but that the executive proscription and its purported statutory authorization, directly and ineluctably affect the citizen's liberty. To this extent, at least, the courts have the power and the duty to examine the action and to measure it by legal and constitutional standards. As was observed in *Kent, supra*, this presents no "political" questions. The court is not asked here to review the basis upon which the executive determined that our citizens might not look inside Cuba. Rather is the court called upon to examine whether this statute properly confers such powers. We do not deal here even with what was asserted in *Worthy* to have been inherent powers of the President. The prosecution here asserts no such powers; the indictment defines an offense under a statute. That statute, as interpreted and applied to this defendant, presents a judicial not a political question.

That question must be determined by legal and constitutional standards.

[fol. 51] 3. *Whether the statute and regulations are void for vagueness.*

We make no answer to the Government's brief argument for it does not meet the contentions we have urged.

4. *Whether the national emergency declared by the President is still in existence.*

We do not seek here to review the facts upon which the Presidential Proclamations of national emergency rest. For it is not claimed here that the proclamations were invalid or baseless when issued. As we understand the cases cited in our original memorandum, it is open in a judicial proceeding, where the effectiveness of the law depends upon facts found some period in advance of the prosecution, to show that the facts so found no longer exist. In effect, what we ask for here is a hearing as to whether or not there is in reality a threat of world conquest by communist imperialism or such increasing menace of the forces of communist aggression as to justify the destruction of the all-important First Amendment liberties so essential to the preservation of a free society.

Respectfully submitted,

Margolis and McTernan, by John T. McTernan, Attorneys for Defendant.

A. L. Wirin, Legal Department, American Civil Liberties Union, Of Counsel.

[fol. 52] Proof of Service by Mail (omitted in printing).

[fol. 53]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRY CONTINUING HEARING ON MOTION TO DISMISS—October 21, 1963

Defendant is present with counsel. Counsel present as shown and due to lateness of the hour and the United States Attorney being detained in another court, Court orders matter continued to October 28, 1963, 10:30 A.M.

[File endorsement omitted]

[fol. 54]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRY OF HEARING MOTION TO DISMISS—October 28, 1963

Defendant is present with counsel. Filed designation of counsel and appearance praecipe of A. L. Wirin for defendant.

Attorney McTernan makes argument from 10:30 A.M. to 10:55 A.M.

Counsel for government makes argument from 10:55 A.M. to 11:02 A.M.

[File endorsement omitted]

Attorney A. L. Wirin (co-counsel) makes argument from 11:02 A.M. to 11:36 A.M.

Counsel for government makes reply argument from 11:36 A.M. to 11:40 A.M.

Court orders defendant's motion to dismiss to "stand submitted."

Counsel estimate case to take 2 days to try by jury.

Court orders 2-day jury trial set for February 25, 1964 at 10:00 A.M. if the motion be denied, if the motion granted, trial date will become "moot".

[fol. 55]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,

vs.

HELEN MAXINE LEVI TRAVIS, Defendant.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS—October 30, 1963

Defendant moves for dismissal of two-count Indictment charging defendant with unlawful departure from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, in violation of Section 1185(b), Title 8, U.S.C., as more particularly set forth in the Indictment. Defendant urges (1) that there is no legislative authority for prohibiting or regulating travel to

[File endorsement omitted]

Cuba or in any way limiting travel on a geographical basis, (2) that the statute delegates legislative power contrary to Article I, Section 8, of the Constitution of the United States, and (3) that the statute is vague, contrary to the First and Fifth amendments to the Constitution and deprives the defendant of liberty without due process of law. Counsel for the parties have filed points and authorities and argued the matter at length. It is not controverted that by proclamation No. 2914, issued December 16, 1950, President Truman proclaimed the existence of a national [fol. 56] emergency by reason of facts therein stated. Such an emergency is a condition precedent to the President imposing "restrictions and prohibitions" on travel. (8 U.S.C. § 1185)

On January 17, 1953, after the adoption of the statute codified as 8 U.S.C. § 1185, in June, 1952, President Truman executed Proclamation No. 3004 for control of persons entering or leaving the United States in which he found, among other things, the said national emergency still existed and that the interests of the United States required restrictions and prohibitions, in addition to those otherwise provided by law. In January, 1961, the Code of Federal Regulations (22 C.F.R. 53.3b) was amended to exclude Cuba from the list of places that one might travel to without a passport.

The continued existence of the national emergency, proclaimed in December, 1950, has been observed on several occasions, the latest being President Kennedy's Executive Order No. 11037 of July 20, 1962.

As defendant points out, one of the conditions of Section 1185, supra, in addition to the proclaimed emergency, is that there must be a finding by the President that the interests of the United States require restrictions and prohibitions upon departure and entry of persons from and into the United States unless he has a valid passport, before the provisions of Section 1185(b) may be implemented. It appears to the court that the proclamation of a national

emergency of December, 1950, satisfied the conditions of Section 1185 although said proclamation antedated the effective date of the statute (June, 1962), and that the findings of President Truman in his Proclamation No. 3004 of January, 1953 re the interests of the United States requiring restrictions and prohibitions as set forth therein met the requirements of the statute and that the restric-
[fol. 57] tions on travel as imposed by the Regulations amended in 1961 to require a United States passport in order to travel to Cuba are valid unless in violation of the provisions of the Constitution.

Defendant strongly relies on the case of *Kent* vs. *Dulles*, 357 U.S. 116, which holds that if a citizen's liberty to travel is to be regulated it must be pursuant to the law making functions of Congress, any delegation of the power must be subject to adequate standards, and such delegated authority will be narrowly construed (See page 129 of the Opinion). However, the court observes in the Kent case, at page 129:

> "Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here."

The court in the Kent case was dealing with beliefs, associations and ideological matters. At page 130, the court observes that it would be faced with important constitutional questions were it to hold that Congress by § 1185 had given the Secretary authority to withhold passports to citizens *because of their beliefs or associations* and that the Secretary "may not employ *that standard* to restrict the citizens' right of free movement." (Emphasis ours.)

Kent vs. Dulles, supra, was discussed in the recent case of *Worthy* vs. *Herter*, 270 F. 2d 905 (D.C. Cir., May 18, 1959), Certiorari denied Oct. 12, 1959. At page 907 of its opinion, the court states:

"We note immediately that the point here presented in no wise resembles the matter decided by the Supreme Court in Kent vs. Dulles.[1] There the Court held that the Secretary refused passports because of the [fol. 58] beliefs and associations of the applicants and that he had no statutory authority to refuse on such grounds."

The Worthy case involved the right of the defendant, a newspaper reporter, to renewal of a passport without restrictions on travel to China and certain other countries with which the United States did not have diplomatic relations. Worthy refused to agree to abide by the restrictions and the renewal of the passport was refused. The court observed that the refusal rested in no part upon Worthy's personal beliefs, writings or character, going on to say, at page 907:

"It was an application of the Secretary of State's general policy of refusing Government sanction to travel by United States citizens in certain areas of the world, presently under Communist control and deemed by him to be trouble spots."

Defendant herein argues that there is no legislative authority to prohibit travel to Cuba or limit travel on a geographical basis, that the statute in authorizing the Executive Department to prohibit travel to Cuba, unconstitutionally delegates legislative power. As observed by the court in the Worthy case, it appears to this court that the President has under his Constitutional powers ample authority to conduct foreign affairs and to conduct and prevent war and, incident thereto, the power to limit travel to Cuba through regulations issued by the State Department. The conducting of foreign affairs would certainly include the authority to limit travel to certain areas of the world by citizens of this country without valid passports.

Whether the national emergency proclaimed in 1950, which Proclamation (No. 2914) was premised, among other [fol. 59] things, on the threat of "world conquest of Communist imperialism" and "the increasing menace of the forces of Communist aggression", has terminated, is not for judicial determination. Neither is the question of whether conditions in Cuba or other reasons involving the conducting of foreign affairs are sufficient to require the limiting of travel to that country.

Professor Commager's article re "Americans Should Have Freedom to Travel", appearing in the New York Times on October 21, 1963, cited by defendant, is thought provoking and Professor Commager eloquently and persuasively states the case for freedom of travel. However, Congress has determined, no doubt after long consideration and study of the problems involved and with access to many facts and opinions of experts in the field, to which Professor Commager did not have access, that under given circumstances it shall "be unlawful for citizens to depart from or enter or attempt to depart from or enter, the United States unless he bears a valid passport." (§ 1185b, supra.)

It appears to the court that political or military conditions and questions are involved herein and, as pointed out above, we are not here concerned with the same question as confronted the court in the Kent case, supra. Neither does it appear that a narrow construction of the delegated powers precludes the instant limitation. The President delegated to the Secretary of State authority for the present limitation by the terms of Proclamation No. 3004. The limitation does not determine which Americans may receive passports but succinctly eliminates Cuba as a country which may be visited without a valid passport therefor. There are certain exceptions to the regulation which are not pertinent to the case at bar.

[fol. 60] If the Constitutional authority of the President is not sufficient to authorize the limitation on travel to

Cuba then the statute as set forth in § 1185, Title 8, U.S.C., clearly provides the necessary authority. What action will best promote our foreign relations is not for the courts to determine, but the President, who operates in that field through the State Department.

The Worthy case is on the civil side and denial of the renewal of a passport was involved while in the case at bar the defendant is criminally prosecuted for having traveled without a passport but the principles and questions here involved are considered and treated in the Worthy case, and the conclusions of that court may be properly applied to the circumstances herein.

It is true that travel to foreign countries has been and is encouraged by the President and rightfully so. To know a people is to better understand them but such travel may be limited by conditions, which in the pursuance of our foreign affairs or in preventing war are found to be prejudicial to our country's best interests, and such determinations are not subject to judicial review but are properly within the province of the duly elected representatives of the citizens of this country. Though right to travel is a part of the "liberty" of which a citizen cannot be deprived without due process of law under the Fifth Amendment, this court concludes that the limitation here involved is invoked with due process of law and the court concludes, as did the court in the Worthy case, supra, that the right to travel, like every other form of liberty, is, in its concept of an ordered society, subject to restrictions under some circumstances and for some reasons.

For the foregoing reasons the defendant's motion to [fol. 61] dismiss is hereby denied.

Dated: October 30, 1963.

E. Avery Crary, United States District Judge.

[fol. 62]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

WAIVER OF TRIAL BY JURY AND WAIVER OF SPECIAL FINDINGS OF FACT [RULE 23(A) AND (C) FED.R.CRIM.P.]—Filed April 7, 1964

The undersigned defendant hereby waives the right to a trial by jury and requests the court to try all charges against him in this case without a jury.

The undersigned defendant further waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

April 6, 1964.

Helen L. Travis, Defendant.

The undersigned attorney and counsellor-at-law represents that prior to the signing of the foregoing waiver, the defendant above named was fully advised as to the rights of an accused under the Constitution and laws to a speedy and public trial by jury, and the right to request special findings in a case tried without a jury; and further represents that, in his opinion, the above waiver by the defendant of trial by jury and special findings is voluntarily and understandingly made, and recommends to the court that the waiver be approved.

April 6, 1964.

John T. McTernan, Attorney for Defendant.

The United States Attorney hereby consents that the case be tried without a jury, and waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

March 16, 1964.

United States Attorney, By Thomas R. Sheridan, Assistant United States Attorney.

Approved April 6, 1964.

E. Avery Crary, United States District Judge.

[File endorsement omitted]

[fol. 63]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

STIPULATION OF FACTS—Filed April 7, 1964

1. It Is Hereby Stipulated by plaintiff, United States of America, by and through counsel, Francis C. Whelan, United States Attorney, and Thomas R. Sheridan, Assistant United States Attorney, for the Southern District of California, and Helen Maxine Levi Travis and her counsel, John T. McTernan and A. L. Wirin, that jury trial is waived (a written waiver of jury trial is also on file) and the Court may decide the case on the following stipulated facts and argument of counsel.

2. That at all times mentioned in both counts of the indictment No. 32380-CD the defendant, Helen Maxine Levi Travis, was and is a citizen of the United States of America, and her residence address was and is 6324 Primrose Avenue, Los Angeles, California.

[File endorsement omitted]

3. That on January 21, 1962, defendant, Helen Maxine Levi Travis, at Los Angeles International Airport, Los Angeles, California, applied for and was issued a United [fol. 64] Mexican States tourist permit number 3677106 through Pan American Airways, allowing her to enter the Republic of Mexico within the next 45 days and remain therein 180 days from the date of entry as a "tourist."

4. That on January 22, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the United States of America by boarding flight number 901 of the Compania Mexicana De Aviacion at the Los Angeles Airport, Los Angeles, California, and was a tourist passenger on said flight to Mexico, D. F., and at the time of boarding said flight at Los Angeles, California, intended to seek permission from representatives of the Republic of Cuba in Mexico, D. F., to visit Cuba, and if such permission was granted, to travel from Mexico, D. F., to Cuba. At the time of departing from the United States as herein stated, defendant, Helen Maxine Levi Travis, did not have Cuba's permission to enter Cuba. On January 23, 1962, in Mexico, D. F., defendant, Helen Maxine Levi Travis, applied for permission to enter Cuba, and said permission was granted on January 26, 1962.

5. That on February 1, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the Central Airport, Mexico, D. F., by boarding flight number 311 of the Compania Mexicana De Aviacion, and was a tourist passenger on said flight to Havana, Cuba.

6. That prior to boarding said flight number 311 at Central Airport, Mexico, D. F., United Mexican States tourist permit number 3677106 was cancelled by an official of the Department of Interior, United Mexican States, at Mexico, D. F.

7. That on August 18, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the United States of America, by automobile at San Ysidro,

California, and entered the Republic of Mexico, at Tijuana, Baja California, and at the time she departed from the United States of America she intended to seek permission from representatives of the Republic of Cuba in Mexico, [fol. 65] D. F., to visit Cuba, and if such permission was granted, to travel from Mexico, D. F., to Cuba. At the time of departing from the United States as herein stated, defendant, Helen Maxine Levi Travis, did not have Cuba's permission to enter Cuba. On August 23, 1962, in Mexico, D. F., defendant, Helen Maxine Levi Travis, applied for permission to enter Cuba, and said permission was granted on August 30, 1962.

8. That on August 18, 1962, defendant, Helen Maxine Levi Travis, applied for and was issued a United Mexican States "tourist" permit number 2997335 at the Office of Migration, Department of the Interior, Tijuana, B. C., allowing her to enter the Republic of Mexico and remain there for 180 days from date of entry.

9. That on August 31, 1962, United Mexican States tourist permit number 2997335 was cancelled by an official of the Department of Interior, United Mexican States, at Mexico, D. F.

10. That on August 31, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the Central Airport, Mexico, D. F., by boarding flight number 465 of the Compania Cubana De Aviacion and was a tourist passenger on said flight to Havana, Cuba.

11. At no time pertinent or material herein did defendant, Helen Maxine Levi Travis, bear a valid United States passport specifically endorsed for travel to the Republic of Cuba; she at all times pertinent and material herein knew the provisions of Section 1185(b) of Title 8, United States Code, and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations.

12. That the defendant, Helen Maxine Levi Travis, on each occasion of her travel to Havana, Cuba, did travel in

and about the Republic of Cuba and observe therein the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health. In the course of said travel and [fol. 66] observation the said defendant took a number of photographs and those photographs attached hereto (as Exs. 1A to 1M) are representative of those taken by her as aforesaid.

13. That after the return of the defendant, Helen Maxine Levi Travis, from the departures set out in paragraphs 3, 4, 5 and 6 and paragraphs 7, 8, 9 and 10 and to her home in Los Angeles, California, she appeared before various groups and gatherings of her fellow citizens and reported to them her observations and findings during her trips to Cuba as aforesaid, and showed her photographs taken there, including Exs. 1A to 1M. In addition, the said defendant wrote descriptions of her trips and her observations in Cuba which she disseminated by mail to friends and acquaintances, and the copy of her letter dated February 28, 1962, attached hereto (as Ex. 2) is representative of the information she communicated to them.

Dated: This 2nd day of April, 1964.

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section, Attorneys for Plaintiff, United States of America.

John T. McTernan, Margolis and McTernan, Attorneys for Defendant, Helen Maxine Levi Travis;

A. L. Wirin, Co-Counsel for Defendant.

Helen Maxine Levi Travis, Defendant.

[fol. 67]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRIES OF WAIVER OF JURY TRIAL, ETC.—
April 7, 1964

PROCEEDINGS: JURY TRIAL:

The defendant is present with counsel. Filed waiver of trial by jury.

Court trial proceedings. Filed stipulation of facts. Filed defendant's contentions.

Plaintiff's exhibits 1-A through 1-M inclusive are marked and admitted in evidence, and plaintiff's exhibit 2 is marked and admitted in evidence pursuant to stipulation. Both sides rest and oral argument continued to 1:30 P.M. today.

Court reconvenes at 1:33 P.M., defendant present with counsel. Counsel for defendant moves for judgment of acquittal and court hears argument by Attorney McTernan from 1:33 P.M. to 2:23 P.M. Attorney Wirin makes argument from 2:13 P.M. to 2:57 P.M. Court recesses at 2:58 P.M.

Court reconvenes at 3:16 P.M., defendant present with counsel. Attorney Sheridan makes argument from 3:12 P.M. to 3:31 P.M. Court permits defendants to file additional memorandum of points and authorities in 10 days and plaintiff 19 days thereafter to file answering brief and defendant 5 days to file reply brief, if necessary, and the matter to stand submitted upon final filing of briefs.

Court adjourns at 3:32 P.M.

John A. Childress, Clerk, By Wayne E. Payne, Deputy Clerk.

EC 4/7/64

[File endorsement omitted]

[fol. 68]

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL—Filed April 17, 1964

This memorandum is submitted pursuant to leave of court following oral argument on defendant's motion for judgment of acquittal. The evidence is set forth in the Stipulation of Fact made and entered into by counsel for the parties with the express participation of the defendant personally. Because of the brevity of the Stipulation, there is no need to summarize the evidence here.

I. *The Defendant's Leaving the United States on January 22, 1962, and August 18, 1962, Was Not a Departure for Cuba.*

The facts dealing with defendant's leaving on each of the occasions mentioned are set forth in Paragraphs 4 and 7 of the Stipulation. On each occasion, defendant crossed the border of the United States into Mexico with the intention of seeking permission from representatives of the Republic [fol. 69] of Cuba in Mexico City to visit Cuba and *if such permission were granted,* to travel from Mexico City to Cuba. On each occasion the facts are that at the time of the departing from the United States, the defendant "did not have Cuba's permission to enter Cuba." On each occasion she obtained that permission *after ariving in Mexico City.* On the first occasion this was four days after her departure from the United States, and on the second occasion that permission was granted twelve days after she left the United States. It is therefore plain that on each occasion when the defendant left the United States, Cuba was

[File endorsement omitted]

not a country which had agreed to receive her on any basis whatsoever.

For there to be a departure from the United States it must be a leaving for a country which is ready to receive the individual involved. *Heikkinen* v. *United States*, 355 U.S. 273, 276, 2 L.ed.2d 264, 267. One can not depart the country at large so to speak or abstractly; he gets no passport to travel nowhere. One could sail out on the high seas far beyond the territorial limits and need no passport. He needs a passport when he departs for another country. He can not depart to such a country unless that country is ready to receive him.

Thus at the time of her departure this defendant had neither the apparent ability to go to Cuba, nor the actual ability to go there. Whether such ability would ever come into being was unknown and completely beyond her power. In spite of considerable preparation therefor, she is not, and cannot be, guilty of the offense charged. See *United States* v. *Moses*, 205 F.2d 358 (CA 2, 1953) and *Liverman* v. *United States*, 260 F.2d 284 (CA 4, 1958). Both of these cases dealt with the offense of possessing an unregistered still. In each case the still had been installed but was not operable because of the need for repairs and adjustments. Since the offense consisted of possessing an operable still, judgments of conviction were reversed. In the [fol. 70] case at bar, defendant's conduct fell far short of that of the cited cases. Whatever her state of mind was when she left the United States, she factually and legally was unable to go to Cuba until she obtained that country's consent for her entry. She did not have that consent when she left the United States' borders, and she did not even apply for it until after she got to Mexico City. There is nothing to show that she had even an assurance that such consent would be obtained when she applied. The consummation of her preparations rested upon facts and volition utterly independent of her conduct or will. Thus the facts here fall short even of attempt. Cf. *Lemke* v. *United States*, 211 F.2d 73 (CA 9, 1954), cert.den. 347 U.S. 1013, 98 L.ed.

1136; *United States* v. *Coplon*, 185 F.2d 629 (CA 2, 1950). In those cases the defendant had engaged in conduct falling just short of the completion of the crime when his conduct was interrupted by others (e.g., police officers) who sought to frustrate the defendant's criminal purpose. In each case, preparations were extensive and the defendant's criminal purpose could have been accomplished by his own volition and conduct but for the intervention of others. Such is not the situation here where defendant's preparations could not even come close to consummating entry into Cuba, for that turned upon action of the Cuban government utterly independent of defendant.

The facts in the evidence, therefore, do not make out the crime of departure as charged or the lesser offense of attempt to commit that crime.

II. *There Is No Legal Basis for the Restriction on Travel Here Involved and No Legal Basis for Making a Violation of the Restriction a Criminal Offense.*

[fol. 71]

(a) *The regulation here involved (i.e., the "excluding Cuba" amendment of 22 C.F.R. 53.3) was not validly or effectively promulgated as a regulation violation of which is a crime.*

The "excluding Cuba" amendment, promulgated January 16, 1961, was not promulgated under 8 USC 1185(b) or under any statute which makes violation of the Secretary of State's regulations a crime.

It is alleged in the indictment and it has been continuously contended by the government in this proceeding that the "excluding Cuba" amendment was made under the authority of Section 1185(b). That statute, it will be recalled, requires possession of a valid passport for purposes of entry and departure to and from the United States. That requirement is subject to the exception phrased, "except as otherwise provided by the President and subject to such

limitations and exceptions as the President may authorize and prescribe." The quoted language is the source of the rule-making authority allegedly involved here. Actually it was the authority for the rule-making power by which the President, in January, 1953, issued Executive Order 3004 and therein adopted and incorporated as his own earlier regulations issued by the Secretary of State which had been codified as 22 C.F.R. Sections 53.1-53.9. We have heretofore handed to the court a copy of Executive Order 3004. There can be no doubt from the face of it that this Executive Order invokes Section 1185(b) as the source of the authority for the rules contained in 22 C.F.R. Sections 53.1-53.9. See the first Whereas clause, the Therefore clause, and Paragraphs 1, 2 and 5 of the Executive Order. Violations of regulations issued under Section 1185(b) are made a crime by Section 1185(c).

As the regulations (22 C.F.R. Sections 53.1-53.9) were [fol. 72] issued (as the President's regulations) in Executive Order 3004, there was in Section 53.3 no restriction on travel to Cuba. At that time, travel to Cuba did not require a passport any more than travel elsewhere on the Western Hemisphere. The words "excluding Cuba" were inserted into Section 53.3 by the amendment of 1961. (26 Fed.Reg. 482.) A copy of that regulation has been handed to the court. On its face, that regulation shows that it was issued pursuant to authority vested in the Secretary of State by Paragraph 126 of Executive Order No. 7856, dated March 31, 1938 (sic), which in turn had been issued under 22 USC 211a and 5 USC 151c. These two code sections do not deal with the subject matter of Section 1185(b); 22 USC 211a is the statute giving general power to the Secretary of State to issue or provide for the issuance of passports, and 5 USC 151c confers the general rule-making power upon the Secretary of State to make rules and regulations necessary to carry out his functions. *There is no statutory provision making violation of any rules issued under these two sections a crime.*

It is true that at the end of the amended 22 C.F.R. 53.3(b) the amending regulation of January 16, 1961, contains in parentheses this entry: (Sec. 215, 66 Stat 190; 8 USC 1185 and Executive Order 3004 dated January 17, 1953, 18 F.R. 489.) This entry does not convert the regulation into one issued under Section 1185. In the Federal Register itself this entry appears in smaller type than the regulation itself and it has the appearance of an editorial insert by the editor of the Federal Register. In any event it is plain from the body of the amending regulation that it does not recite either 8 USC 1185 or Executive Order 3004 as the express source of its authority.

Public Notice 179 (26 Fed. Reg. 492) which was issued simultaneously with the 1961 amendment, makes it abun- [fol. 73] dantly clear that the Secretary, or his deputy, was not acting under Section 1185(b) in imposing the restrictions and prohibitions on travel to Cuba. Public Notice 179 specifically states that it is issued pursuant to the authority vested in the Secretary under Executive Order 7856, dated March 31, 1938, and 22 USC 211a. There is no reference in Public Notice 179 to Section 1185(b). It is public Notice 179 which completes the restriction effected by the 1961 amendment, for it is in the former that the Secretary declares that United States passports "shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State." It seems plain beyond question that the regulatory scheme adopted in January 1961 (and the one which defendant is charged with having violated) was not, in the mind of the Secretary of State, promulgated under 8 USC 1185 or Executive Order 3004. The parenthetical references to Section 1185 and Executive Order 3004 in the 1961 regulation amendment juxtaposed to the actual statutory recitals of the authority for that amendment indicate the administrative intent not to base the regulation upon the authority of Section 1185.

Moreover, and doubtless conclusively, this has been the government's position in other litigation involving the question of the right of the Secretary to deny passports for

travel to Cuba. In the *MacEwan* and *Zemel* cases[1] the government expressly asserted that the 1961 amendment was issued only under the authority of 22 USC 211a and Execu- [fol. 74] tive Order 7856. See the government's memorandum in *MacEwan*, p. 8.[2] In *Zemel*, Judge Blumenfeld stated in his partial dissent that there the government expressly disclaimed that the 1961 amendment was issued pursuant to 8 USC 1185. (See Opinion, p. 40-A, Appendix C.) If the government should urge here that the 1961 amendment was issued under the authority of 8 USC 1185 it will take a position contrary to that twice taken before other federal courts.

Since the amending regulation of 1961 was not issued by either the President or the Secretary of State pursuant to 8 USC 1185 or Executive Order 3004, that amending regulation was not promulgated under any statute which makes it a criminal offense to violate the regulation. *Per contra*, it was specifically promulgated under statutes (22 USC 211a and 5 USC 151c) which contain no provision making violations of regulations issued under them a crime.

But even should it be deemed a regulation issued under 8 USC 1185, the 1961 amending regulation does not satisfy the requirements of that statute. Section 1185(b) is operative at all only after a Presidential Proclamation meeting the requirements of Section 1185(a). These requirements, so far as relevant here, are that the President determine the existence of a "national emergency" and "find that the interests of the United States require that restrictions and prohibitions . . . be imposed upon the departure of persons from and their entry into the United States." Since this is a criminal statute which trenches upon areas protected by the First Amendment, the rule of strict construc-

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[1] *MacEwan* v. *Rusk*, USDC, E.D. Penna., dec. 3/30/64; opinion appended as Appendix C; *Zemel* v. *Rusk*, USDC, D. Conn., dec. 2/20/64, opinion appended as Appendix D. These cases were discussed upon the argument.

[2] A copy of the memorandum was handed to the court upon the argument.

tion applies in full vigor. See *Kent* v. *Dulles*, 357 U.S. 116, 2 L.ed.2d 1204 (1958). The statute is therefore to [fol. 75] be read as requiring that as to all restrictions and prohibitions imposed upon departure and entry, there be a Presidential finding that the same are "required" by the interests of the United States. This means, as we see it, not simply that the President finds broadly and in the abstract, at large, if you will, that such restrictions and prohibitions are required in the interests of the United States, but that he find that the specific restrictions and prohibitions set forth in the regulations be so required. The findings of January, 1953, found to justify the restrictions and prohibitions set forth in 22 C.F.R. 53.1 (Executive Order 3004), cannot support restrictions and prohibitions of an utterly different kind imposed in 1961. The 1961 amendment contains no finding whatsoever concerning the necessity in the interests of the United States for the restrictions and prohibitions effected by inserting the words "excluding Cuba" into the regulations of 1953. Thus the amendment lacks the finding that the statute makes requisite to the amendment's validity.

There remains the question of whether the rule-making power granted by Section 1185(b) can be validly delegated by the President at all. It is to be noted that Executive Order 3004 *purported to delegate to the Secretary of State* the power to modify and revise the rules (22 C.F.R. 53.1-53.9) issued by the President via that Executive Order. The amending regulation of January, 1961, was issued not by the Secretary of State but by his "Deputy Under-Secretary for Administration." There are strong considerations urging that the power created under Section 1185(b) is not delegable at all and was not intended by the Congress to be delegable to lower officials. The very absence of a standard for executive action (see Point IV, *infra*) results in conferring upon the President an area of virtually unfettered discretion. The rule-making power, while directed at [fol. 76] the relations between this government and its citizens, also affects to some extent the country's foreign rela-

tions. Restrictions upon travel affect constitutional liberties of large social importance. (*Kent* v. *Dulles, supra.*) Finally, if the regulation be adopted pursuant to the authority of Section 1185(b) it defines a crime under Section 1185(c). The exercise of power so gravely affecting the rights of citizens and so related to the country's relations with foreign affairs, and at the same time defining standards of conduct whose violation may constitute a felony, plainly calls for both the judgment and the responsibility of the Presidential office itself. (Cf. *The Presidency and Individual Liberties,* Longaker, Cornell Univ. Press, 1961, pp. 85-87.) We do not deal here with the imperative urgencies of executive administration in wartime where vast subdelegations of power were justified by the need to get the job done. (See, e.g., *Presidential Delegation of Authority in Wartime,* Grundstein, Univ. of Pgh. Press, 1961, *passim.*)

All that is said here is urged with awareness of the provisions of 3 USC 301, 302. We submit that the power of subdelegation there given cannot extend to the powers conferred by Section 1185 as applied in this case. For in that event the Congress will have abdicated even the selection of the official whose judgment defines the crimes which the Congress in Section 1185(c) has created so vaguely. By leaving it to the President's delegee to adopt the restrictions without Congressional standards[3] and to the President to select his delegee in his own discretion, the legislative function exercised by Congress would amount merely to a suggestion that the executive make a law. This is not [fol. 77] the exercise by Congress of a legislative function; it is a Congressional surrender of it.

(b) *The restriction on travel here involved finds no basis in the inherent power of the executive.*

The issue here turns on the distinction between (a) governmental control over travel as an instrument of foreign

[3] See Point III, *infra.*

policy in the relations of this country with other nations, and (b) governmental control over travel in the relationship between this government and its own citizens. The former involves exercise of the executive prerogative. This is a "political" area where the executive operates without judicial review and where the courts have no competence to act. But in the latter no executive power is involved and the government must act in accordance with the law and subject to constitutional limitations protecting the rights of citizens in a free society.

In *Kent* v. *Dulles, supra,* the Supreme Court decided that the distinction here urged was a real one and that where the government acted in the second of the areas above described it must needs have power created by law and observe constitutional limitations. The Court said that the regulation of exit and entry of this country's citizens is not one of the "political questions entrusted to the Chief Executive by the Constitution." (357 U.S. at 129.) It observed that the diplomatic aspects of the passport and its request for safe passage and protection are now "subordinate functions" of the passport. The crucial function of the passport today is "control over exit." "And as we have seen, the right of exit is a personal right included in the word 'liberty' as used in the Fifth Amendment. *If that 'liberty' is to be regulated it must be pursuant to the lawmaking functions of the Congress.*" [Emphasis added.] (357 U.S. at 129.) It further pointed out in the sentence immediately following the one quoted that any exercise of [fol. 78] such power is subject to the usual judicial scrutiny for constitutional infirmity.

We therefore submit that the Court of Appeals for the District of Columbia in the first *Worthy* case (*Worthy* v. *Herter,* 270 F. 2d 905 [CA DC, 1959], cert. den. 361 U.S. 918) and this court in its decision on the motion to dismiss in the case at bar failed to observe a distinction which the Supreme Court has made mandatory in these premises. We deal here not with a political question on which the executive is given unreviewable power of decision, but with

the liberties of a free people which can be restricted, if at all, only pursuant to laws passed by the Congress and then only in accordance with the guarantees of the Bill of Rights.

(c) *Congress in enacting Section 1185(b) did not authorize the executive to impose the limitation here involved on travel to Cuba.*

There is discussed below (Point IV) that the effect of the 1961 amendment to the Presidential regulation (22 C.F.R. 53.3) is in fact and law a provision for censorship over travel to Cuba. The amended regulation does not forbid travel to Cuba. It makes such travel unlawful except when the traveler bears a passport specially validated for such travel.[4] This censorship is effected by combining the 1961 regulatory amendment with the requirements of Public Notice 179. The effect is that in order to travel to Cuba, the citizen must satisfy the Secretary of State that his travel is in the best interests of the United States. What those interests are and the standards for meeting them are not defined. If the citizen gets the passport, the Secretary [fol. 79] has approved the travel. If he doesn't get the passport, the Secretary has disapproved his travel and the travel is frustrated. Neither before nor after the event can the citizen know the basis for the Secretary's action. This is censorship in its crudest form.

We argue here not that the regulation should be struck out because it is censorship (that argument is presented *infra*) but rather that, because the regulation does effect censorship, it plainly invades the area of the First Amendment. For this reason and for the further reason that we deal with a criminal statute, the scope of the statute is to be strictly limited to no more than what its bare words allow.

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[4] Such is the effect of the 1961 amendment when combined with Public Notice 179 and Press Release No. 24; copies are appended to this brief as Appendix A and Appendix B respectively.

On the plain face of the statute there is nothing to suggest the assertion of a power so broad and so contrary to our traditions against censorship. As a matter of unadorned meaning of simple language straightforwardly used, the statute is properly assayed by Judge Smith in *Zemel, supra*:

> "It requires a truly remarkable feat of judicial gymnastics to construe this statute narrowly as a grant of power to invalidate passports for travel to certain countries." (Opinion, App. D., p. 26-A.)

These conclusions are amply supported by the legislative history. At this point we incorporate by reference all that was said under Point 2 of our Memorandum in Support of Defendant's Motion to Dismiss. We present in addition two items of legislative history which cast more light on the Congressional intent upon which Section 1185(b) rests.

In May, 1952, when the 1941 statute predecessor to Section [fol. 80] 1185(b) was in effect,[5] the Secretary of State announced that henceforth it would stamp all passports not valid for travel to Albania, Bulgaria, China, Czechoslovakia, Hungary, Poland, Rumania and the Soviet Union unless specifically endorsed by authority of the Department of State as being valid for such travel. But in the very announcement to that effect, the Department of State was sedulous to point out that its action did not render travel of this kind forbidden. Its precise language was as follows:

> "In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized." (Press Release No. 341, May 1,

[5] The Statute may be found as the Act of 1941, 55 Stat. 252. It was invoked on November 14, 1941, 55 Stat. 1696, and was later extended to April 1, 1963, 66 Stat. 54, 57, 96, 137, 330, 333.

1952; 26 Department of State Bulletin No. 672, May 12, 1952, p. 736.)

As later developed in Congressional hearings, Americans did travel to the countries named above without specifically endorsed passports. No criminal prosecutions followed. When the Senate attempted to inquire exactly what the policy of the Department was, whether the government intended to enforce the restriction on travel to those countries by criminal prosecution, the Department's evasiveness was sharply commented upon by the Senate Committee. (See Hearings Before the Committee on Foreign Relations, [fol. 81] U.S. Senate, 85th Congress, 1st Session, and Department of State Passport Policies, pp. 3, 14, 15, 18, 40, 54, 56, 59, 78.) When, as we pointed out in the Memorandum Supporting Motion to Dismiss, the Congress adopted Section 1185(b) it was on the advice of its Committees that it was merely a reenactment of the 1941 statute in substantially identical terms. This history must of necessity indicate that Congress did not consider Section 1185(b) as imposing the kind of restrictions now sought to be enforced criminally against this defendant.

Another incident illustrates the same thing. Immediately following the *Kent* decision, *supra*, President Eisenhower advised the Congress that in light of that decision there was needed statutory authority to deny passports where their possession would be inimical to the national security. At his request and direction, the Secretary of State submitted a proposed bill which was introduced in the 85th Congress, 1st Session, as § 4110. This proposed legislation contained provisions giving power to deny passports on the grounds just indicated. It provided criminal penalties for travel without such a passport. Although the legislation was before the 85th and the 86th Congresses, it never passed.*

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*The Presidential message can be found at 104 Cong. Record 11849; the House document at H. Doc. No. 417; 3 U.S. Code, Congressional and Administrative News, 85th Cong. 2d sess. 1958, R465.

This last incident was reviewed in a report of the Association of the Bar of the City of New York.[1] Of the Eisenhower message it said, "This appears to have been an honest admission of the lack of statutory power to enforce an area [fol. 82] restriction . . ." On the subject as a whole it stated in part: "The Committee has not discovered any statute which clearly provides a penalty for violation of the area restrictions, and this seems to be a glaring omission. . . ."

Congress had no reason to think that Section 1185 would be used in any manner different from its predecessor statute. Specifically it had every reason to believe that it would not be used in the manner in which it has been invoked against this defendant.

III. *Construed and Applied So as to Authorize the President to Forbid or Censor Travel of Individual Citizens to Cuba, the Statute Delegates Legislative Power Contrary to Article I, Section 8 of the Constitution of the United States.*

It is plain from the face of Section 1185(b) that it contains no standards to guide the President in authorizing and prescribing the limitations and exceptions to the passport requirement. *Kent* v. *Dulles, supra,* specifically and unqualifiedly says that there must be. In the passage noted earlier the Court held that the issuance and denial of passports is not a political matter subject to the inherent powers of the executive. Rather, such issuance is a regulation of individual liberty which can be effected only pursuant to the law-making function of Congress. Then, as if anticipating the very problem in this case, the Court added, "And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." (357 U.S. at 129.)

Nor are there implied standards governing the Presidential action. It can not be implied from this enactment, for example, that the standard to govern the executive action

[1] Entitled "Freedom to Travel: A Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York."

is whatever best promotes the foreign relations of the United States. For in the first place we deal here not with [fol. 83] control over foreign relations but the regulation of the conduct of citizens. Moreover, as the legislative history reviewed in our Motion to Dismiss so conclusively shows, this statute is a border control statute, a provision for security in wartime and national emergency, not a charter for the conduct of foreign relations. To say that the Presidential action under Section 1185(b) is to be governed by the best interests of our foreign relations is to deny the existence of any standard whatsoever for, as the *Worthy* case observes, in that area the President is governed by no standards imposed by the Congress or by judicial review.

We incorporate by this reference all that was said on this subject under Point 3 of our Memorandum Supporting Defendant's Motion to Dismiss. There the applicable authorities, incidentally also cited in *Kent* v. *Dulles, supra,* are reviewed.

We wish to point out here, in addition to what was said on the Motion to Dismiss, the potential implicit in this prosecution for the assertion of arbitrary power and the subversion of judicial independence. The very lack of legislative standards to govern executive action creates this potential.

We have noted the disparate uses of executive authority in this very area of restrictions on travel under the predecessor statute to Section 1185. It was pointed out, *ante,* that although the State Department announced in 1952 that it would authorize travel to "Iron Curtain" countries only upon passports specifically validated for such travel, the Department went to some pains to make clear that these regulations did not "forbid" travel to those countries. We have also observed the failure of the government to prosecute people who went to those countries without validated passports. We also noted President Eisenhower's message to Congress and his request for further legislation which he said was needed to create the power which is now exerted under a statute no different from the statute then

[fol. 84] in effect. This history is to be particularly observed in light of the frank admissions by the government that its regulatory scheme for censoring travel to Cuba is part of the administration's international political policies to isolate Cuba and effect a hemispheric non-intercourse with that nation. We have handed to the court a copy of the government's memorandum in *MacEwan* v. *Rusk*, Case No. 33038, United States District Court, Eastern District of Pennsylvania, in which this position is stated without qualification. The writers of the instant memorandum have been advised by counsel in the *MacEwan* case and in the *Zemel* case that the government filed identical memoranda in both cases. United States citizens are being refused passports for Cuba today as part of a foreign relations program to isolate Cuba and to bring economic pressures upon that country to change its form of government. It is not the function of this court, and defendant does not ask of it that it do so, to weigh the wisdom or the foolishness, the morality or the immorality, the consistency or inconsistency of such action with this country's treaty obligations, or any other factors which have led the executive to adopt so parlous and potentially explosive a policy. These considerations are truly matters for the political judgment of those in charge of our country's foreign relations. But it is quite another set of considerations for this government to prosecute its citizens who act contrary to rules established to carry out that foreign policy. For in those premises the executive invokes the judicial power. It seeks to have this defendant, for example, convicted of crime and punished by judicial judgment. To the extent that rules invoked against this defendant are vehicles of the foreign policy, as the government has indicated in *Zemel* and *MacEwan, supra*, the government seeks to make the court an effective instrument of executive expediency. [fol. 85] As the lever for invoking such executive expediency, the government employed the grant of arbitrary power, bereft of statutory standards, set out in Section 1185(b).

To maintain its traditional position of independence, to stand as it should between the people and the arbitrary exercise of executive power, the court, we submit, must resist this appeal to expediency. We commend the words of Judge Healy in *Bridges* v. *United States,* 184 F.2d 881, 887 (CA 9, 1950):

> "... and we say now, with all the emphasis we are able to command, that however hard and disagreeable may be the task in times of popular passion and excitement, it is the duty of the courts to set their faces like flint against this erosive subversion of the judicial process."

The *Bridges* case is apposite here. For there the government sought to induce the court to deny a convicted man the statutory right to bail pending appeal because the government asserted that he was in effect convicted of being a Communist, the country was involved in the Korea incident, and his continued freedom was a threat to national security. There the government would have perverted the judicial processes related to the availability of bail. Here the government would resort to the courts to overturn liberties entitled to First and Fifth Amendment protection (as declared by the Supreme Court in *Kent* v. *Dulles, supra*) in order to implement a foreign policy and the power politics of the cold war. The government has seized upon a statute which sets no limit upon executive action in the regulation of its citizens' liberties and exercises that power to achieve political ends as a matter of international expediency. The very absence of statutory standards has created arbitrary power which, in terms of the liberties of our people, has been arbitrarily used. In-
[fol. 86] deed the government has gone so far in this case as to assert that the power exercised here is not even subject to judicial review. Unless the principle confining legislative power to the legislature is observed here, the court is led ineluctably to the point where its powers are enlisted in aid of executive expediency.

IV. *As Construed and Applied Here, the Statute Deprives Defendant of Her Right to Travel Contrary to the First and Fifth Amendments to the Constitution of the United States.*

We have already pointed out how the 1961 amendment, combined with Public Notice 179 and Press Release No. 24, constitutes a regulatory scheme designed for the censorship of the individual's right to travel. *Kent* v. *Dulles, supra,* has held that this right is a liberty protected by the Fifth Amendment and entitled to the protection of the First Amendment. Perhaps the most salient aspect of that liberty is, as the Court pointed out in *Kent* v. *Dulles,* its availability as a direct and indirect source of information needful to the people for meeting the exigencies of their time. Travel permits the individual to see for himself. It permits trained observers to observe and report so that others may be informed. All of this bears directly and immediately upon the democratic process whereby the people, as the repository of sovereignty whose consent is the basis of all government in this country, may reach an informed consensus on the men and measures suitable for the effectuation of their will. As respects Cuba, the informed will of the American people bears upon questions of life and death, not only for themselves but for the planet as a whole. In such a context to say that the American people may know about Cuba only what is in the official handouts is a travesty on the democratic process matching in the macabre the works of Hieronymus Bosch. Indeed to say that they may know only what is reported by those [fol. 87] newsmen and businessmen whose travel to Cuba the proponents of official policy may approve is to offer sources of information only slightly less offensively restricted. It is no answer to the needs of the American people for information on matters so grave to say that they pertain to foreign relations and that policy in these matters may be determined by appointed officials. For this is to give officialdom the means of perpetuating itself and

insulating its policies from public debate. At all events the people through their representatives are entitled to vote on questions of war and peace and certainly to petition their government concerning matters of foreign relations. The travel censorship here invoked substantially clogs the processes whereby our citizens can determine their own positions and exert informed pressure upon their representatives at the seat of government.

Against the background of these considerations, it is helpful to review the facts of record. The Stipulation recites (Paragraph 12) that on each occasion of defendant's travel to Cuba she traveled in and about the Republic of Cuba and observed therein the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health; that she took photographs of what she saw (including Exhibits 1-A through 1-F); that upon her return to the United States defendant appeared before various groups and gatherings of her fellow citizens and reported to them her observations and findings and showed her photographs; and that she wrote descriptions of her trip and her observations in Cuba which she disseminated by mail to friends and acquaintances. Exhibit 2 is a sample of such communications. True it is, as was observed on the oral argument, that defendant's observations are rather enthusiastically [fol. 88] pro-regime, that at the conclusion of her letter she twits herself for writing "such heartfelt propaganda." However one may evaluate the accuracy or the completeness of her observations, they are a report of things observed and they bear vitally on an issue important to United States policy toward Cuba—the support of the Cuban people for their government and their experience in the "War on Poverty." Moreover her listeners and her readers had a plain right to listen to these facts and weigh them in reaching the decisions which they will one day register in the ballot box or by petition to their Congress.

If the exercise of such precious rights is to be balanced against legitimate interests of the government, it would indeed take grave governmental concern to tip the balance against them. First, let it be observed that these liberties are not simply personal. They are those which are inherent in the democratic process created in the Constitution itself. They are the means by which the nexus between the sovereign people and the governmental agent is meaningfully maintained. They are themselves weighted with a profoundly governmental intent. Surely the government's responsibility to protect Americans imprisoned abroad (22 USC 1732) has no weight here. Where circumstances are such that Americans may be mistreated in the area where they want to travel, our government could insist upon the waiver of the citizen's right to this protection as a condition of granting the passport. The government suggested on oral argument that a single individual in a foreign country might engage in conduct that would involve us in war. This is speculative and conjectural. The presence of Soviet troops in Cuba surely can no more create a tinderbox to be set off by ill-advised action of a single American, than the presence of many more Soviet troops in the Soviet Union or middle Europe, and Americans are permitted to travel there. It is easy to conjure up shadowy [fol. 89] images of American citizens engaging in conduct abroad that might create some form of international crisis. But today we permit our citizens to travel to many trouble spots in the world, West Berlin included. This writer is unaware of international incidents created by such travel. Indeed the only incidents that come to mind at this time are those created by misguided aircraft that violate international boundaries without the benefit of passports or other clearance. In balancing First and Fifth Amendment interests against the asserted governmental interest in obviating international incidents, we must weigh realities, facts not turgid prose or labile imaginings. Let the gov-

ernment try to suggest specific facts, not generalities. It has not done so and it can not do so.

Respectfully submitted,

Margolis and McTernan, by John T. McTernan, Co-Counsel for Defendant, and A. L. Wirin, Co-Counsel for Defendant.

[fol. 90]

Appendix A

Public Notice 179

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1962 (44 Stat. 887, 22 USC 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked." (26 Fed. Reg. 492.)

[fol. 91]

Appendix B

Press Release No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

[fol. 92] Proof of Service (omitted in printing).

[fol. 93]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL—Filed April 28, 1964

The plaintiff opposes the defendant's motion for Judgment of Acquittal on the following grounds:

1. The defendant on both occasions departed from the United States in violation of 8 U.S.C. 1185(b).

2. 22 C.F.R. 53.3 was validly and effectively promulgated under 8 U.S.C. 1185.

3. 8 U.S.C. 1185 is not an unconstitutional delegation of legislative power.

4. 8 U.S.C. 1185 is not unconstitutional under the First and Fifth Amendments to the Constitution.

Respectfully submitted,

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section, Attorneys for Plaintiff, United States of America.

[fol. 94]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR JUDGMENT OF ACQUITTAL

I

Preliminary Statement

The plaintiff opposes the defendant's motion for judgment of acquittal. For convenience sake this opposition

[File endorsement omitted]

will treat defendant's points in the order set forth in defendant's memorandum; however, it is apparent to plaintiff that most if not all of the defendant's contentions have been completely answered by the following cases:

Kent v. *Dulles*, 357 U.S. 116 (1958);
Worthy v. *United States*, 328 F.2d 386 (C.A. 5 1964);
Porter v. *Herter*, 278 F.2d 280 (C.A. D.C. 1960), cert. den. 361 U.S. 918;
Worthy v. *Herter*, 270 F.2d 905 (C.A. D.C. 1959), cert. den. 361 U.S. 918;
Frank v. *Herter*, 269 F.2d 245 (C.A. D.C. 1959), cert. den. 361 U.S. 918;
MacEwan v. *Rusk*, U.S. D.C., E.D. Pa., 3/30/64;
Zemel v. *Rusk*, U.S. D. C., Conn., 2/21/64;
United States v. *Travis*, Memorandum decision of 10/30/63 denying the motion to dismiss the indictment in the instant case.

II

The Defendant's Departures from the United States as Charged in Both Counts of the Indictment and Supported by the Evidence Constitute Violations of U.S.C. § 1185(b).

The facts are clear that on January 22, 1962 and August 18, 1962 the defendant knowingly and willfully departed from the United States for Cuba without a valid passport [fol. 95] for such travel. At the time of each departure the defendant intended to go to Cuba, and each time the defendant went to Cuba. The defendant argues that even though she left the United States with the intent to go to Cuba, her entry into Cuba was dependent upon receiving Cuba's permission to enter Cuba, which is *not* to say that defendant left the United States *without* intending to go to Cuba.

The statute is clear and unambiguous. It makes it an offense for anyone to willfully depart from the United States without bearing a valid passport, that is, a passport valid for travel to the country of destination. The

defendant not only departed from the United States bound for Cuba, but actually went to Cuba on each occasion.

In support of her position the defendant cites the case of *Heikinen* v. *United States*, 355 U.S. 273. There a defendant was indicted for willfully failing to depart from the United States within six months from the time of an alien deportation order. The court recognized in its holding that there is no willful failure to depart until the country willing to receive the alien is identified. The criminal action charged in that case was one of omission rather than one of commission and it is therefore no support for defendant's position. She also cites *United States* v. *Moses*, 205 F.2d 358 (C.A. 2, 1953), and *Liverman* v. *United States*, 260 F.2d 284 (C.A. 4, 1958). Both of these cases deal with the offense of possessing an operable still. Since it was found that the stills were not operable, judgments of conviction were reversed. We fail to see the applicability of those cases to the instant case. She also cites the cases of *Lemke* v. *United States*, 211 F.2d 73 (C.A. 9, 1954), and *United States* v. *Coplon*, 188 F.2d 629 (C.A. 2, 1950), as authority for the proposition that the commission of the crime was prevented by others who sought to frustrate the defendant's criminal purpose. We also do not believe that these cases apply because the type of offenses there involved are not analogous to the instant case.

[fol. 96]

III

22 C.F.R. 53.3 Was Validly and Effectively Promulgated

The defendant's point here is that 22 C.F.R. 53.3 promulgated on January 16, 1961 and excluding Cuba from the list of countries that a citizen may travel to without a passport specifically endorsed for such travel was not validly and effectively promulgated since it was not promulgated under authority of 8 U.S.C. § 1185(b). As authority for this conclusion, defendant states that in the *MacEwan* and *Zemel* cases (*supra*) the Government expressly asserted that this amendment was issued only under the authority of 22 U.S.C. § 211(a) and Executive Order 7856. A

careful reading of the Government's memoranda in these cases will reveal that the Government took the position that the regulation in question was validly issued and amended under the inherent Executive power, 8 U.S.C. § 1185 and 22 U.S.C. § 211(a). But of more import and weight is the case law on this precise point.

Judge Freedman in *MacEwan* (*supra*), in holding that the Secretary of State had the power to and in fact did validly and effectively promulgate the amended regulation, said: "The Secretary of State does not rely solely on inherent Executive power. He claims statutory authority for the regulations he has promulgated. There are two acts of Congress to which the Secretary points as the sources of his power, one is Section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185. The other is the Passport Act of 1926, Section 1, 22 U.S.C. 211(a)." (Memorandum opinion, pages 8, 9)

In the *Zemel* case (*supra*) Judge Clarie, writing for the majority, stated:

"In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the [fol. 97] Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211(a) and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185." (Memorandum opinion, page 11)

Judge Clarie also found that the Secretary of State pursuant to the authority contained in Presidential Proclamation 3004, amended Section 53.3(b) of Title 22 C.F.R. (Memorandum opinion page 14)

It is important to note that at the very outset of Section 53 of Title 22 C.F.R., the authority for the promulgation of Section 53 is specifically stated to be 8 U.S.C. 1185. It should also be noted that at the end of 22 C.F.R. 53.3(b), as amended, appears the following: "(sec. 215, 60 Stat. 190; 8 U.S.C. 1185 and Proclamation 3004 dated January 17, 1953, 18 F.R. 489). This clearly indicates that the Secretary of State was relying on the cited statute and

proclamation when he amended Section 53. We have been advised by the State Department that this appears in the amendment as written by the Secretary of State and was not something added as an editorial insert by the editor of the Federal Register as the defendant has indicated in her memorandum.

Thus it is apparent that the amending regulation was promulgated under 8 U.S.C. § 1185 and Executive Order 3004, and as such is a regulation the violation of which is a criminal offense pursuant to statute.

Defendant then makes the additional argument that even if the regulation were promulgated under 8 U.S.C. § 1185 it is not a valid regulation because that statute requires the President of the United States to personally find "that the interests of the United States require the restrictions and prohibitions" and such a finding is absent.

In Executive Order 3004 the President of the United States stated:

> "NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by [fol. 98] virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of Title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States . . . ."

In the same Executive Order, 22 C.F.R. 53.1 to 53.9, as prescribed by the Secretary of State, were specifically adopted and incorporated into the Order, and then the Order continues: "and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require."

Since the Secretary of State has received this authorization by Presidential Proclamation, it is completely unrealistic to argue that the Secretary does not have the au-

thority, but that the President must personally prescribe the necessary restrictions each and every time the necessity therefor arises.

In this regard, the defendant also takes the unique position that the President cannot delegate the rule-making power granted by Section 1185(b) to any one and he must execute it personally. This position completely ignores the plain wording of 3 U.S.C. 301 and 302. By Section 301, Congress gave the President authority to delegate any function which is vested in the President by law and Section 302 states that the authority shall apply to any function vested in the President by law if such law does not affirmatively prohibit delegation of the performance of such function. No such prohibition is contained in Section 1185.

[fol. 99] It may also be noted that the intent of Congress for the President to delegate such functions is strongly indicated by the very wording of Section 1185(b) which states " . . . and subject to such limitations and exceptions as the President may *authorize* and prescribe. . . . " (Emphasis added) That the President authorized the Secretary of State to promulgate the regulation in question seems abundantly clear from the President's expressed grant of such authority in his Proclamation #3004.

In the case of *Scarbeck* v. *United States,* 317 F.2d 546 (C.A. D.C. 1962), cert. den. 374 U.S. 856 (1963), the statute involved was 50 U.S.C. 783(b) which stated in part, "It shall be unlawful for any officer or employee of the United States . . . to communicate . . . to any other person who such officer or employee knows or has reason to believe to be an agent or a representative of any foreign government . . . any information of a kind which shall have been classified by the President (or by the head of any such department . . . with the approval of the President) as affecting the security of the United States . . . . " The information there involved had been classified by the American Ambassador in Warsaw, Poland. The defendant argued that the statute required that the information be personally classified by the President or by the Secretary of State. In rejecting

this contention, the Circuit Court stated, "At the outset, we note that the construction of the statute urged by appellant would largely reduce it to a dead letter. With the pressures of more urgent business, the President and the Secretary of State of necessity could personally classify very few documents or items of information."

As a matter of fact the Secretary of State did make the amendment to 22 C.F.R. 53.3 here in question. We are attaching hereto a copy of a letter from the files of the State Department dated January 16, 1961 from the Administrator, Bureau of Security and Consular Affairs which specifi- [fol. 100] cally states that it was the Secretary of State who instituted the passport requirements for citizen travel to Cuba and invalidating passports for such travel unless specifically endorsed therefor. This letter forwarded the amendment to the Deputy Under Secretary of State for Administration so that he could sign it for the Secretary merely in his administrative capacity. The pertinent portion of that letter reads: "Attached for promulgation by you are the necessary documents to effectuate the Secretary's decision re citizen travel to Cuba." It might be noted that the amendment as it appears in the Federal Register (26 F.R. 482) shows that it was signed by Mr. Henderson "for the Secretary of State."

However, it is our opinion that even if this amendment had been made by the Deputy Under Secretary of State for Administration at the request of the Secretary of State it would be valid since 5 U.S.C. 151(c) specifically gives the Secretary of State the authority to promulgate regulations and *also* the authority to delegate such authority.

The defendant next argues that while the Executive has inherent power to control foreign relations it has no such power to control its own citizens and that such control of its citizens can only be done by the legislative branch of the Government. This contention was completely answered by this court in its memorandum of October 30, 1963, denying the defendant's motion to dismiss the indictment in the instant case, where at page 4 it said, "As observed by the

court in the *Worthy* case, it appears to this court that the President has under his constitutional powers ample authority to conduct foreign affairs and to conduct and prevent war and incident thereto the power to limit travel to Cuba through regulations issued by the State Department. *The conducting of foreign affairs would certainly include the authority to limit travel to certain areas of the world by citizens of this Country without valid passports.*" (Em-
[fol. 101] phasis added) And, at page 6, "If the constitutional authority of the President is not sufficient to authorize the limitation on travel to Cuba, then the statute as set forth in Section 1185, Title 8, U.S.C., clearly provides the necessary authority." This same position was taken by the courts in *Frank* v. *Herter*, 269 F.2d 245 (C.A. D.C. 1959), cert. den. 361 U.S. 918; *Porter* v. *Herter*, 278 F.2d 280 (C.A. D.C. 1960), cert. den. 361 U.S. 918, and in the *Zemel* and *MacEwan* cases.

The defendant's final argument on this point is that Congress never intended to authorize the Executive to limit travel to Cuba in such a fashion that disobedience would be criminal. The obvious answer to this is: 8 U.S.C. § 1185, which in fact and law authorizes the President to restrict travel and makes it a criminal offense to violate such restrictions.

Defendant in support of her argument cites from a Public Notice and Press Releases of the State Department and concludes from them that travel to a designated restricted country is not illegal but only travel without a specially endorsed passport for such travel. This is really a distinction without a difference as applied to defendant as she travelled to Cuba twice without a specially endorsed passport for such travel. Defendant does not argue the legal effect of such items as Press Releases and Public Notices, but in any case defendant never applied for a specially endorsed passport for Cuba.

There is an interesting analogy to the law which prohibits a person from engaging in the business of accepting wagers unless he has paid the $50 occupational tax on such

activity. The crime is not being in such business, but rather being in such business without paying the $50 tax. So here, the crime is not in the travel, but in the travel without the specially endorsed passport.

[fol. 102] Defendant states that others have done the same thing and have not been prosecuted for such travel. This is of course no defense even if true, as it is completely immaterial to this case; however, we are constrained to point out that saying that others did the same thing falls far short of being able to prove (as we have done here) that a person willfully travelled in violation of the law.

MacEwan (*supra*, pp. 11, 12), answers the defendant's reliance on subsequent congressional activity not amounting to new legislation when it said that, "the failure of Congress to act does not answer the question of what the existing statutes authorized. For where the power had already been granted by statute, the failure of Congress to enact new legislation amounts to no more than an unwillingness to confirm an already existing power. The request of an Executive for confirmatory legislation may result simply from the practical desirability of avoiding litigation and contest of his power."

IV

8 U.S.C. § 1185 Is Not an Unconstitutional Delegation of Legislative Power, Nor Is It Unconstitutional Deprivation of Defendant's Rights Under the First and Fifth Amendments to the Constitution.

The matters were developed at great length on the defendant's motion to dismiss the indictment and this Court on October 30, 1963 decided these points adversely to the defendant. There is no additional case law cited by defendant or known to plaintiff's attorneys to support the defendant's position since this Court's decision, but there is additional case law to support this Court's decision denying the motion to dismiss (see cases cited, *supra*).

V

Plaintiff respectfully submits that the Court should: deny the motion for judgment of acquittal, find the defendant [fol. 103] guilty as charged in each count of the indictment, and set a date certain for sentencing.

Respectfully submitted,

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section, Attorneys for Plaintiff.

[fol. 104]

ATTACHMENT TO OPPOSITION

DEPARTMENT OF STATE

Administrator

Bureau of Security and Consular Affairs

January 16, 1961

To: O—Mr. Loy W. Henderson

From: SCA—John W. Hanes, Jr.

Subject: Restrictions on Travel to Cuba

The Secretary has approved restrictions on travel to Cuba. The alien control regulations have been signed by the Secretary and concurred in by the Attorney General. The Secretary approved (January 14) instituting the passport requirement for citizen travel to Cuba and invalidating passports for such travel unless specifically endorsed therefor. (See attached staff paper.)

Attached for promulgation by you are the necessary documents to effectuate the Secretary's decision re citizen travel to Cuba.

Tab A amends 22 CFR 53.3(b) to exclude Cuba from the general exemption from the passport requirement presently applicable to Western Hemisphere countries.

Tab B is a public notice declaring outstanding passports invalid for travel to or in Cuba except the passports of citizens now in Cuba and announcing that passports hereafter shall not be valid for travel to or in Cuba unless specifically endorsed for such travel.

The press release to be issued today states that the Department contemplates making exceptions to these regulations in certain cases such as newsmen and businessmen with previously established business interests.

RECOMMENDATION:

That you sign Tabs A and B.

Attachments.

[fol. 105] Certificate of Service by Mail (omitted in printing).

[fol. 106]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

DEFENDANT'S REPLY MEMORANDUM—
Filed May 6, 1964

Pursuant to leave already given, defendant files this reply to the government's memorandum in opposition to the motion for judgment of acquittal. We answer herein only certain of the points raised by the government, indicating in each instance the government's point to which our argument is directed.

[File endorsement omitted]

I. *Defendant's Leaving the United States on January 22, 1962 and August 18, 1962, Was Not Departure for Cuba. (Answering the government's Point II.)*

The government's argument that on the occasions in question defendant departed for Cuba rests upon two propositions: First, that when the defendant left the United States she intended to go to Cuba; and, second, that after she left the United States she did go to Cuba. This argument misconceives the point. The crime, if any was committed, occurred at the time she crossed the border of the United [fol. 107] States. She could not have departed the United States for Cuba at that time unless she was able to go to Cuba. At that time she was not able to go to Cuba because she had not made application for permission to enter. At the time she crossed our borders, then, the defendant departed for Mexico City, having obtained the permission of the Mexican authorities to enter Mexico to go to Mexico City. Her intent to go on to Cuba is irrelevant unless Cuba was then ready and willing to receive her. That she then later went to Cuba is irrelevant because by that time she had long since crossed the border. Departure for Cuba had to occur at the time she crossed the border; it could not have occurred then because she had no ability to enter Cuba.

In these lights, the *Moses* and *Liverman* cases are directly apposite. The offense charged was possession of the still. By judicial construction, possession was defined as pertaining only to an operable still. The defendants had a still, they intended to use it, but at the time of the arrest it was not operable. They had then no present ability to operate it. They did not violate the law.

Nor did defendant engage in an attempt on either occasion. She had engaged in some preparation to go to Cuba, to be sure. But her preparations had not carried her sufficiently toward the completed offense. What she had done up to the time she crossed our borders did not approach achieving the ability to accomplish her purpose. She had done nothing to obtain the needed permission to enter Cuba, and there is no evidence that she had any reasonable basis

for expecting that when the request for permission was made it would be favorably acted upon. In short at the time she crossed the border of the United States defendant's purpose to enter Cuba had been carried no further than preliminary preparation.

In this context *Lemke* and *Coplon* are helpful and persuasive. They teach that to establish guilt of attempt the [fol. 108] preparation must have been carried to the point where the defendant is close to the point of consummating his purpose. In those cases the consummation of the crime was imminently possible by virtue of the preparations made and was frustrated only by the intervention of law enforcement officers, not by reason of any lack in the defendant's preparations. Here no such preparation plus clear ability to complete the offense exists. For at the time of defendant's crossing of the border of the United States, she could not have departed for Cuba; she had neither obtained nor instituted the steps necessary to obtain the permission of Cuba to enter. Plainly therefore she engaged in some preparation but not enough to constitute attempt.

It must be kept in mind that neither the statute nor the regulation is as clear and unambiguous as the government claims. (Memo, p. 3, lines 7-10.) The regulation (22 C.F.R. 53.3) permits a citizen to leave the United States for Mexico and most of the Western Hemisphere without bearing any passport at all. Defendant had arranged with the Mexican government to enter Mexico on a tourist card. (Stipulation, ¶3, p. 1, line 30 to p. 2, line 3; ¶8, p. 3, lines 8-12.) When she left the United States on each of the occasions charged defendant could have entered but *one country* in the entire world, viz, Mexico. In doing precisely this defendant acted well within the regulations. On both occasions charged this was all defendant could have done. Her preparations had carried her no further up to the time of crossing the border. She had the time and place to reconsider and she had not set in motion a train of preparations that would bring about her ability to enter Cuba.

There was, then, no departure for Cuba. There was a departure for Mexico City, which was lawful, and no more than a mere possibility that later defendant would be allowed to enter Cuba. To permit later conduct bringing about the capability of entering Cuba to relate back to render criminal that which when done was expressly permitted is to render the statute and the regulations fatally [fol. 109] vague. Men of normal understanding can not know what is forbidden and what permitted. *Connally* v. *General Construction Company,* 269 U.S. 385, 391; 70 L.ed. 322, 328; *Small* v. *American Sugar Refining Company,* 267 U.S. 233, 238-240; 69 L.ed. 589, 593-594; *Burstya* v. *Wilson,* 343 U.S. 495; 96 L.ed. 1100; *Winters* v. *New York,* 333 U.S. 507; 92 L.ed. 840; *Niemotko* v. *Maryland,* 340 U.S. 268; 95 L.ed. 267; *Kunz* v. *New York,* 340 U.S. 290; 95 L.ed. 280.

II. *There Is No Legal Basis for the Restriction on Travel Here Involved and No Legal Basis for Making a Violation of the Restriction a Criminal Offense. (Answering the government's Point IV.)*

(a) *The regulation here involved (i.e., the "excluding Cuba" amendment of 22 C.F.R. 53.3) was not validly or effectively promulgated as a regulation violation of which is a crime.*

The government (Memorandum, p. 4, lines 13-18) does not correctly state the position it took in *Zemel* and *MacEwan.* There the government said that the "excluding Cuba" amendment expressly derived its authority from 22 USC 211a and further that the Secretary had inherent power to take this action. So that there may be no doubt of the government's position in that litigation we quote from its memorandum in *Zemel,* pp. 8 and 9 (copy already handed to the court):

"While the Secretary expressly predicated his authority to invalidate passports for travel to Cuba unless such passport is specifically endorsed for such travel under the authority of the Secretary on Sections 124 and 126

of Executive Order No. 7856 issued on March 31, 1958 (3 F.R. 681, 687; 22 C.F.R. 51.75 and 51.77) under the authority of Section 1 of the Act of July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), his inherent power to take such restrictive action is not dependent on any Con- [fol. 110] gressional grant of authority."

We submit that this leaves no reason for doubt. Heretofore the position of the government has been that the "excluding Cuba" amendment was expressly and specifically promulgated upon statutory or other authority *other than* 8 USC 1185. Thus up to this case the government's position has necessarily been that this amendment was not promulgated under a statute which makes violation of the regulations a crime.

Two of the three judges in *Zemel* so understood the government's position and so read the regulation. Judge Smith (dissenting on the merits but agreeing with Judge Clarke on the jurisdiction of the three judge court) said of the government's position: " . . . the defendant [i.e., the Secretary of State and the Attorney General] expressly disclaims reliance upon it [i.e., §1185(b)] here as a source of authority for the regulation excluding travel to Cuba." *Zemel* opinion, p. 31a. Judge Blumenfeld (dissenting on the jurisdiction of the three judge court but agreeing with Judge Clarke on the merits) said that the "Secretary expressly disclaims reliance upon" §1185. *Zemel* opinion, page 40a. Concerning the "excluding Cuba" amendment on its face Judge Smith said, "The regulations themselves did not purport to be based on §215 [§1185]." *Zemel* opinion, p. 26a. Judge Blumenfeld read the regulation thusly:

> "The statute, §211a, has placed the authority to issue passports in the Secretary of State 'under such rules as the President shall designate for and on behalf of the United States.' One of these rules provides: 'The Secretary of State is authorized in his discretion . . . to restrict it [a passport] against use in certain countries.' 22 C.F.R. §51.75 (1949). Under a claim of authority thus derived from §211a, the Secretary imposed a

restriction upon travel to Cuba on January 16, 1961 . . . " (Opinion, p. 36a.)

[fol. 111] In *MacEwan*, Judge Freedman asserted (Opinion, p. 9) that the Secretary "points to" two statutory sources of power, viz., 22 USC 211a and 8 USC 1185. This assertion would not seem to be supported by the government's memorandum quoted earlier. The judge's later observation (Opinion, p. 16) that the Secretary "relies separately for his authority to control travel to Cuba on the Passport Act of 1926, 22 USC 211a" [1] appears more nearly in accord with the government's written position. He finally held that the Secretary had "authority to impose geographical restrictions on the use of passports by virtue of his general power under the Passport Act of 1926." (Opinion, pp. 19-20.)

It would therefore seem that the "excluding Cuba" amendment has, prior to this litigation, been deemed by the government itself to rest solely upon the statutory authority of 22 USC 211a. Most of the judges who heard the government's position and construed the regulation containing the amendment so understood the government and so read the regulation. The position asserted here, that the amendment rests upon 8 USC 1185, is a direct contradiction of positions taken by the government in prior litigation.

The government can derive no support for its present and hastily conceived position from the text of 22 C.F.R. §53. The recitals there of 8 USC 1185 relate back to the original adoption of those regulations by President Truman in 1953. (E.O. 3004.) At that time, the regulation did not contain the "excluding Cuba" language that was added in 1961 by an amending regulation of the Secretary of State, by his Deputy Under-Secretary for Administration. (26 Fed. Reg.

[1] In referring to the promulgation of the "excluding Cuba" amendment, the learned judge makes no reference to the statutory authority (28 USC 211a) and the Executive Order (No. 7856) expressly recited in the regulation itself as the source of its authority. (Opinion, p. 14.)

[fol. 112] 482.) As already observed, the body of this regulation recites its statutory basis to be 28 USC 211a *and that alone.* The parenthetical material is not part of the regulation. It is not referred to in the regulation as the source of its authority or otherwise. Counsel's statement (Government Memorandum, p. 5, lines 14-18) concerning the condition of the regulation "as written by the Secretary of State" (sic) must be rejected and ignored. This is a matter of proof; the evidence has been closed in this case. We do not accept this statement; it can not be considered as an agreed fact in this proceeding. Moreover if there were evidence proffered on the subject it is not competent in its present form. 28 USC 1733(b).

Additionally the "proof" offered by the government (Memorandum, p. 7, line 28 to p. 8, line 11) can not be received at this time for the same reason. The evidence in this case is closed. We do not accept the "evidence" as reflecting the facts. As offered, if the government does offer it as evidence, the document is incompetent because not authenticated. 28 USC 1733(b); Rule 27, Fed. R. Cr. Proc.; *Mullican* v. *United States,* 252 F.2d 398 (CA 5, 1958).

(b) *The restriction on travel here involved finds no basis in the inherent power of the executive.*

The government makes no answer to our argument here. It merely restates formulations which blur the distinction between political determinations by the Executive pursuant to the prerogatives inherent in his position and governmental regulation of travel in the relations between citizen and government. *Kent* v. *Dulles* requires that this distinction be observed and that in the latter area the Executive act only with statutory authority and consistent with the Constitution. We are in such an area in this case, the first *Worthy* case notwithstanding.

[fol. 113]

(c) *Congress in enacting Section 1185(b) did not authorize the Executive to impose the limitation here involved on travel to Cuba.*

The government has attempted no answer to our argument here. We have pointed out the censorship inherent in the "excluding Cuba" amendment and the administrative practices which implement it as set forth in Public Notice 179. This censorship is exercised by means of imposing geographic limitations on the right to travel and requiring specific government approval of travel to that area. We contend that § 1185 confers no authority to impose geographical limitations and that the legislative and administrative history affords no basis for inferring a Congressional purpose to confer power to impose such limitations.

We deal here with Congressional intent and meaning and, as was made plain in *Kent* v. *Dulles*, a statute will be construed where possible to avoid constitutional questions. In the search for the Congressional purpose, Judge Freedman states perhaps the best argument available to the government when he says in *MacEwan*:

> "The language of the statute expressly authorizes restrictions on departure from the United States without a valid passport. If the statute is broad enough to prohibit the departure of a citizen from the United States without a valid passport, it is difficult to see why a partial barrier is not within the statute. If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power." (Opinion, p. 10.)

But properly to apply the maxim that the greater includes the lesser one must be sure that each involves the same thing. Here Judge Freedman deals with different things [fol. 114] and the maxim has no application. § 1185 was plainly enacted as border control legislation. The passport

requirement was a device to keep watch over, and where necessary to prevent, the goings and comings of fugitives, lawbreakers and spies. It did this by making passports necessary for departures and entries and thus forcing the identification of travelers and their destinations. This was a measure to protect the internal security of the United States. But only in this sense was § 1185(b) a measure by which travel was "entirely prohibited." It is *toto coelo* a different thing to demark areas of the world off limits to the citizen and permit travel there only on a passport that bespeaks the Secretary's approval of that travel by a particular traveler. This is not the lesser part of the entire prohibition. It is the employment of the entire prohibition for an utterly different purpose. It effects a qualitatively different prohibition for a qualitatively different end. So used the statute becomes a device for censoring the citizen's travel to serve the ends of international policy—to facilitate non-intercourse with Cuba, as the government candidly admits in the memoranda filed in *Zemel* and *MacEwan*.

Thus the reasoning of Judge Freedman results in a construction of the statute which violates elementary canons applicable with especial force to criminal enactments that infringe upon the First Amendment. For this is not a narrow construction. It does not read the statute as requiring passports in a narrow context and to serve but a narrow purpose, all made clear by the Congress. It rather reads the statute as having an amorphous and protean meaning serving not the Congressional purpose but the exigencies of executive policy. It indeed accomplishes what Judge Smith in *Zemel* aptly terms "a truly remarkable feat of judicial gymnastics" by which a prohibition upon a citizen's [fol. 115] entering or leaving the United States in a time of national emergency is converted into a "grant of power to invalidate passports for travel to certain countries." (Opinion, p. 26a.)

Conclusion

For all the reasons heretofore urged, the motion for judgment of acquittal should be granted, the defendant freed and her bond exonerated.

Respectfully submitted,

Margolis and McTernan and A. L. Wirin, by John T. McTernan, Co-Counsel for Defendant.

[fol. 116] Proof of Service by Mail (omitted in printing).

[fol. 117]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MEMORANDUM OPINION ON FINDING DEFENDANT GUILTY AS CHARGED—May 14, 1964

Defendant is indicted on two counts for violation of 8 U.S.C. § 1185(b). The violations consist of defendant knowingly and willfully departing from the United States for Cuba on January 22, 1962, and August 18, 1962, without a valid passport for such travel. It is agreed that on each departure defendant intended to go to Cuba and did go to Cuba. Each of defendant's trips to Cuba was accomplished by going to Mexico City with the intent to obtain authority of Cuban representatives in Mexico to visit Cuba. On each occasion this authority was obtained and, as noted above, Cuba was visited. Defendant urges that although she left the United States with the intent to go to Cuba, her entry into Cuba was dependent on receiving Cuba's

[File endorsement omitted]

permission after arriving in Mexico City and that to violate the statute here involved her departure from the United States must have been for a country which was ready [fol. 118] to receive her. The case of *Heikkinen* vs. *U. S.*, 355 U.S. 273 at 276, and other authorities cited by defendant, do not appear to support this defense.

Section 1185(b) provides in pertinent part:

> "• • • it shall • • • be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

If there is a legal basis for the restriction of travel by the promulgation of 22 C.F.R. 53.3, which excludes Cuba from the list of countries to which a citizen may travel without a passport specifically endorsed for such travel, then the court concludes defendant is guilty of the offenses charged. Defendant argues there is no legal basis for the restriction on travel here involved and no legal basis for making a violation of the restriction a criminal offense. Defendant, by way of argument [pg. 3-10 of her Memo in support of motion for judgment of acquittal], urges that the regulation last above mentioned was not promulgated under 8 U.S.C. 1185(b), which makes violation a crime [1185(c)], but actually under Executive Order 7856 and 22 U.S.C. 211(a) and 5 U.S.C. 151(c) which makes no provision for violation thereof to be a crime. This position of defendant is not supported by the opinion of the District Court in *MacEwan* vs. *Dean Rusk*, [D.C.E.D. Pa. Civil Action No. 33038, decided March 30, 1964] wherein Judge Freedman states at pages 8 and 9 of his opinion:

> "The Secretary of State does not rely solely on inherent executive power. He claims statutory authority for the regulations he has promulgated. There are two Acts of Congress to which the Secretary points as the [fol. 119] sources of his power. One is §215 of the

Immigration and Nationality Act of 1952, 8 U.S.C. §1185. The other is the Passport Act of 1926, §1, 22 U.S.C. §211(a)."

Following this statement, the court, at pages 12-14, outlines the history and contents of the pertinent Presidential proclamations (beginning with President Truman's proclamation No. 2914 on December 16, 1950), regulations prescribed by the Secretary of State and amendments thereto and Public Notice No. 179, referred to by defendant herein.

The MacEwan case, supra, involved an action by plaintiffs therein for declaratory judgment which would declare invalid regulations issued by the Secretary of State (22 C.F.R. 53.3) pursuant to which they were refused endorsement on their passports for travel to Cuba. Both sides moved for summary judgment. Plaintiffs' motion was denied and the defendants' motion granted. In *Zemel* vs. *Dean Rusk*, et al., [D.C. Conn. Civil Action No. 9549, decided February 20, 1964] Judge Clarie, of a three-judge court, writing the majority opinion, observes at page 9:

> "It is this Court's finding that Congress has granted adequate authority to the Executive Department to make these regulations, that their application in this instance does not violate due process and the statutes which authorize the regulations, 22 U.S.C.A. § 211(a) and 8 U.S.C.A. § 1185 are valid and constitutional."

and at page 12:

> "In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. [fol. 120] §211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185."

The Zemel case involved an action by plaintiff "• • • for a declaratory judgment and to enjoin the enforcement

and execution of two acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185, both of which the plaintiff claims are repugnant to the Constitution." Both plaintiff and defendants moved for summary judgment. Plaintiff's motion was denied and defendants' motion was granted. Two of the judges of the three-judge court sitting on the case filed opinions concurring in part and dissenting in part from the majority opinion of Judge Clarie. Judge Smith disagreed with the view that the area restrictions are authorized and Judge Blumenfeld, although agreeing with Judge Clarie that the area restrictions are a reasonable regulation of travel, did not think the plaintiff was entitled to a construction of 8 U.S.C. 1185 before it is raised in a criminal proceeding.

This court concludes, after considering all of the arguments and examination of documents submitted by the parties, that Title 22 C.F.R. 53.1-9 was promulgated under the authority of 8 U.S.C. 1185 and that the amending regulation (1961) was also promulgated under said section and Presidential Executive Order No. 3004 which was issued under that statute. In Executive Order No. 3004, President Truman clearly found as provided therein "* * * that the interests of the United States require the restrictions and prohibitions, * * *." Said Executive Order adopted and incorporated therein 22 C.F.R. 53.1-9 and authorized the [fol. 121] Secretary of State to "revoke, modify or amend such regulations as he may find the interests of the United States to require." Such delegation of authority is authorized by 3 U.S.C. § 301 and 302. See also 8 U.S.C. 1185(b).

Defendant urges that the restrictions on travel here involved find no basis in the inherent power of the Executive, that the issue here turns on government control over travel in relationship between this Government and its own citizens as distinguished from control as an instrument of foreign policy in the relations of this country with other

countries. This point was considered by this court on defendant's motion to dismiss and the court adheres to its conclusion at that time, that the conduct of foreign affairs would include the authority to limit travel to certain areas of the world by citizens of the country without valid passports.

The other points made by defendant in support of her motion for acquittal are that:

(a) Congress, in enacting 8 U.S.C. 1185(b), did not authorize the Executive to impose the limitations here involved,

(b) Such construction of the statute delegates legislative power contrary to Article I, Section 8, of the Constitution of the United States, and

(c) Such construction deprives defendant of her right to travel contrary to the First and Fifth Amendments of the Constitution of the United States.

As to (a) above, the court is of the opinion that the provisions of Section 1185 are sufficient to impose the penalty therein provided for violation of the limitation of travel to Cuba as set forth above. New legislation is not believed [fol. 122] to be required. See MacEwan, supra, page 12. Points (b) and (c) above were argued by defendant in her motion to dismiss and considered by the court in its Memorandum Opinion filed October 30, 1963, on denying the motion to dismiss and that opinion is hereby adopted and made a part hereof by reference. It is to be noted that following the motion to dismiss in the instant action, further proceedings were delayed pending the rulings of the courts in the MacEwan and Zemel cases, supra. The opinions in those cases, which have not as yet been reported, discuss and rule on most of the points urged by defendant in the case at bar and this court cites those civil actions in support of its conclusions herein.

Defendant depends in substantial part, in support of her position in the instant case, on the opinion of the Supreme Court of the United States in *Kent* vs. *Dulles*, 357 U. S. 116 (1958). The Supreme Court in the Dulles case was concerned with the delegation to the Secretary of State of authority to withhold passports to citizens because of their beliefs and associations. In the opinion of this court, the Kent case is clearly to be distinguished from the situation in the case at bar, as pointed out and discussed in the court's opinion re denying defendant's motion to dismiss, mentioned hereinabove, and that discussion will not be repeated at this time. For additional discussion of Kent vs. Dulles, supra, see also the MacEwan case, supra, pages 3-6, 17-19 and 23, and the Zemel case, supra, at pages 19-22, and cases there cited.

In the recent case of *Worthy* vs. *United States*, 328 F. 2d 386 (1st Cir. Feb. 20, 1964), the court was concerned with criminal liability on the part of the appellant, Worthy, who had *entered* the United States without a valid passport after visiting Cuba. In reversing the District Court, which [fol. 123] held that Worthy had unlawfully entered the United States without a passport in the circumstances, the Court of Appeals observed that an unlawful entry does not include an unlawful departure. At page 393 of its opinion, the court states:

> "If the conviction of the appellant had been for a willful *departure* from the United States without a valid passport we would be confronted with a less difficult problem. A citizen, at an airport or pier, without a passport, can refrain from a violation of the statute by remaining in the country. So doing, the citizen can continue to exercise all of the rights and privileges of citizenship and enjoy the protection afforded to him by constitutions and laws incident to his citizenship." (Emphasis added.)

Also:

"Since Congress has the power to declare a policy with respect to foreign affairs, and to impose reasonable restrictions on the right of the citizen to travel in foreign countries, it follows that it may punish violations of the statute. See Hyde v. Shine, 199 U.S. 62, 25 S. Ct. 760, 50 L. Ed. 90."

Defendant is so insistent that her departure from the United States with intent to go to Cuba (by way of Mexico City) without a valid passport for Cuba does not violate the statute and regulation involved, that further brief comment on the point appears to be in order. It appears obvious that the intent of Congress was to allow the President, through the Secretary of State, to preclude travel to excluded areas or countries in circumstances such as are [fol. 124] here involved. In the opinion of the court, "departure from the United States for Cuba" is tantamount to leaving the United States with the intent to go to Cuba which, it is agreed, the defendant did, and without a valid passport. If the effect of the statute and regulation can be circumvented by a citizen going to another country and there obtaining authority to travel to the excluded country then the intent of Congress would be entirely obviated and the statute and regulation nullified.

The court concludes, after consideration of the stipulation as to facts, the oral argument of counsel and the memoranda of points and authorities filed, that defendant's motion for acquittal should be and is hereby denied, and the court finds the defendant guilty as charged on each of the counts in the Indictment.

Dated: May 13, 1964.

E. Avery Crary, United States District Judge.

[fol. 124a]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MEMORANDUM RE OPINION AND FINDING OF GUILT—May 14, 1964

The defendant is present with counsel. Court makes statement and finds defendant Guilty as charged in counts 1 and 2. Filed court's memo opinion on finding defendant Guilty as charged and copies are handed to counsel in open court.

Court orders matter referred to the Probation Office for investigation and report and continued to June 22, 1964 at 2:00 P.M. and defendant ordered be present.

(Issued Abstract Probation Office.)

[File endorsement omitted]

[fol. 125]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 32380—Criminal

UNITED STATES OF AMERICA,

v.

HELEN MAXINE LEVI TRAVIS.

JUDGMENT AND COMMITMENT—June 22, 1964

On this 22nd day of June, 1964 came the attorney for the government and the defendant appeared in person and by counsel, John T. McTernan and A. L. Wirin.

It Is Adjudged that the defendant has been convicted upon her plea of not guilty and a finding of guilty of the offense of knowingly and willfully departed from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a valid passport is required by regulations, in violation of Title 8, United States Code, Section 1185(b), as charged in Counts 1 and 2 of the Indictment and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 6 months and that she pay a fine of $500.00 on each of Counts 1 and 2.

It Is Further Adjudged that the sentence of imprisonment of each of said Counts shall run concurrently and that the sentence as to imprisonment only on each of said Counts is suspended and defendant is placed on probation for a period of 2 years on the following terms and conditions: (1) That she pay the fine provided for in this Judgment on each of said Counts in a lump sum or in installments arranged through the Probation Department. (2) That she obey all municipal, state and federal laws. (3) That she comply with the rules and regulations of the Probation Department.

It Is Ordered that execution of this judgment be stayed for 10 days.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

E. Avery Crary, United States District Judge, by Richard F. Janisch, Clerk.

Filed: June 22, 1964, John A. Childress, Clerk.

[fol. 126]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

NOTICE OF APPEAL—Filed June 25, 1964

Name and Address of Appellant: Helen Maxine Levi Travis, 6324 Primrose Avenue, Los Angeles, California 90028.

Name and Address of Appellant's Attorney: John T. McTernan and A. L. Wirin, 3175 West Sixth Street, Los Angeles, California 90005.

Offense: Violation of 8 U.S.C. §1185(b) and 22 C.F.R. §§53.2, 53.3—two counts.

Concise Statement of Judgment or Order, Giving Date and Any Sentence: Adjudged guilty as charged on each of the counts, on May 13, 1963. On June 22, 1964, sentenced to six months imprisonment on each count (sentences to run concurrently) and a fine of $500 on each count; sentence as to imprisonment only suspended and defendant placed on probation for two years; execution of judgment stayed for ten days.

[fol. 127] The above named appellant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: June 25, 1964.

John T. McTernan and A. L. Wirin, by John T. McTernan, Co-counsel for defendant.

[File endorsement omitted]

[fol. 128] Proof of Service by Mail (omitted in printing).

[fol. 129]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

DESIGNATION OF RECORD ON APPEAL—Filed July 6, 1964

Defendant-Appellant requests that the following be included in the record on appeal in the above entitled cause:

1. The Indictment—6/26/63.
2. Minutes on Arraignment—7/22/63.
3. Waiver of Defendant's Presence—9/30/63.
4. Defendant's Motion to Dismiss Indictment—9/9/63.

[File endorsement omitted]

5. Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss—9/9/63.

6. Minute Orders (2)—9/9/63.

7. Plaintiff's Opposition to Motion to Dismiss—10/8/63.

8. Minute Order—10/14/63.

9. Defendant's Reply to Opposition to Defendant's Motion to Dismiss—10/18/63.

10. Minute Order—10/21/63.

11. Minute Order—10/28/63.

[fol. 130] 12. Memorandum Opinion and Order Denying Defendant's Motion to Dismiss—10/30/63.

13. Waiver of Jury Trial—4/6/64.

14. Stipulation of Facts, Including All of the Exhibits.

15. Defendant's Motion for Judgment of Acquittal.

16. Defendant's Memorandum Supporting Motion for Judgment of Acquittal, Including Appendices A and B and Omitting Appendices C and D.

17. Plaintiff's Opposition to Defendant's Motion for Judgment of Acquittal—4/28/64.

18. Defendant's Reply Memorandum—5/6/64.

19. Memorandum Opinion Finding Defendant Guilty as Charged—5/14/64.

20. Order Finding Defendant Guilty as Charged—5/14/64.

21. Judgment and Sentence—6/22/64.

Dated at Los Angeles, California, June 30, 1964.

John T. McTernan and A. L. Wirin, by John T. McTernan, Co-Counsel for Defendant-Appellant.

[fol. 131] Proof of Service by Mail (omitted in printing).

[fol. 133]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title omitted]

STATEMENT OF POINTS ON APPEAL—Filed October 15, 1964

The points upon which defendant-appellant will rely on appeal are:

1. There is no legal basis for the restriction on travel here involved and no legal basis for making a violation of the restriction a criminal offense.

(a) The regulation here involved (i.e., the "excluding Cuba" amendment of 22 C.F.R. 53.3) was not validly or effectively promulgated as a regulation violation of which is a crime.

(b) The restriction on travel here involved finds no basis in the inherent power of the executive.

(c) Congress in enacting Section 1185(b) did not authorize the executive to impose the limitation here involved on travel to Cuba.

2. Construed and applied so as to authorize the President to forbid or censor travel of individual citizens to Cuba, [fol. 134] the statute delegates legislative power contrary to Article I, Section 8 of the Constitution of the United States.

3. As construed and applied herein, to authorize the Executive Department to prohibit travel to Cuba or in any way limit travel on a geographic basis, the statute (8 USC 1185[b]) is fatally vague contrary to the First and Fifth Amendments to the Constitution of the United States.

4. As construed and applied here, the statute deprives appellant of her right to travel contrary to the First and Fifth Amendments to the Constitution of the United States.

5. The statute and the regulations thereunder, as applied here, are unreasonable and capricious and deprive appellant of liberty without due process of law and can not be justified by the Presidential Proclamations of 1950 and 1953. [Procl. No. 2914, 64 Stat. A 454; Procl. No. 3004, 67 Stat. C 31.]

Dated: This 15th day of October, 1964.

A. L. Wirin, John T. McTernan, by John T. McTernan, Attorneys for Defendant-Appellant.

[fol. 135] Certificate of Service by Mail (omitted in printing).

[fol. 137]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORDER OF SUBMISSION—April 1, 1965

This cause coming on for hearing, John T. McTernan, argued for the appellant, and Robert L. Keuch, Attorney, Department of Justice, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

[fol. 138]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title omitted]

ORDER REVOKING SUBMISSION

The order submitting the above matter this day made is hereby revoked, and the matter will await the decision of the Supreme Court in Zemel vs. Rusk (No. 86 in the current term) argued 3/1/65.

After such determination an appropriate order will be made either submitting the case, or calling for further oral argument, or written briefs, as counsel may desire and this Court orders.

4/2/65

cc: Manuel Real, U. S. Atty.
J. Walter Yeagley, Asst. Atty. Gen.
John T. McTernan, Atty. at Law

[File endorsement omitted]

[fol. 139]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—November 19, 1965

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[fol. 140]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 19,628

HELEN MAXINE LEVI TRAVIS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

OPINION—November 19, 1965

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Koelsch, Circuit Judges; and Powell, District Judge.

PER CURIAM:

This appeal is from a judgment and conviction for violation of 8 U.S.C. §1185(b) and the regulations thereunder, Sections 53.1 through 53.9, Title 22, Code of Federal Regulations as amended. The indictment in two counts charged that on January 22, 1962, and August 18, 1962, the appellant knowingly and willfully departed the United States for Cuba without a valid passport for such travel. A jury trial was waived and appellant was tried by the court on an agreed Stipulation of Facts.

Appellant is an American citizen. At all times pertinent and material she did not bear a valid United States passport specifically endorsed for travel to Cuba. Appellant had knowledge of the provisions of 8 U.S.C. §1185(b) and 22 CFR 53.2 and 53.3. Appellant made two trips to Cuba from the United States, both via Mexico. She obtained permission of the Cuban government to enter Cuba after her arrival in Mexico. On both occasions of her departure from

the United States it was appellant's intention to travel to Cuba.

Zemel v. *Rusk*, 381 U.S. 1, was decided by the Supreme Court in May, 1965, after this case had been argued. It was [fol. 141] a civil action brought to compel the Secretary of State to issue a valid passport for travel to Cuba. The plaintiff there sought to enjoin the enforcement of the same criminal statute and regulations under which appellant here was convicted. The area restrictions on the issuance and use of passports were held constitutional and an authorized delegation of authority to the President and Secretary of State. 381 U.S. pages 7 through 13. The court declined to pass on the request to enjoin the enforcement of 8 U.S.C. §1185(b). It stated:

> "* * * We hold that on either interpretation of the complaint, the court below was correct in refusing to reach the issue of criminal liability.
>
> "* * * For if we are to avoid rendering a series of advisory opinions, adjudication of the reach and constitutionality of §215(b) must await a concrete fact situation. * * *" Zemel v. Rusk, 381 U.S. 1, at 19, 20.

Appellant attacks the statute, 8 U.S.C. §1185[1] as not authorizing area restrictions, being void as vague and not [fol. 142] being cited in the promulgation clause of the amendment to the regulations which is referred to as the "Excluding Cuba" regulation. (22 CFR 53.3).

---

[1] "(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * *

[*Continued on next page*]

Area restrictions have long been used and are recognized as valid. 381 U.S. pages 7 through 13. Section 1185 made it unlawful to depart for Cuba without a valid passport in violation of 22 CFR 53.1-53.9, as amended. A reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport. That appellant knew this is agreed in the stipulation. The "Excluding Cuba" regulation is an amendment and as originally promulgated, 22 CFR 53.1-53.9, made specific reference to 8 U.S.C. §1185. We consider the statute and regulations valid against appellant's attack. *United States* v. *Healy,* 376 U.S. 75, 82, N. 7; *Worthy* v. *Herter,* 270 F. 2d 905, 912 (D.C. Cir. 1959); *Porter* v. *Herter,* 278 F. 2d 280, 282 (D.C. Cir. 1960); *Worthy* v. *United States,* 328 F. 2d 386 (5 Cir. 1964).

Appellant contends hers was not a departure for Cuba as she did not have that country's consent to enter Cuba when she left the United States. Possible fact situations, including the one here, are suggested in *Zemel* v. *Rusk,* 381 U. S. 1, 19. It is our opinion that appellant did depart from the United States for Cuba without a valid passport in violation of 8 U.S.C. §1185(b). We adopt a portion of the opinion of the trial court:

"Citizens

(b) After such proclamation as is provided for in sub-section (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

"Penalties

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; • • • ."

"In the opinion of the court, 'departure from the United States for Cuba' is tantamount to leaving the United States with the intent to go to Cuba, which, it is agreed, the defendant did, and without a valid passport. If the effect of the statute and regulation can be circumvented by a citizen going to another country and there obtaining authority to travel to the excluded country then the intent of Congress would be entirely obviated and the statute and regulation nullified." (T. 123)

We affirm.

[fol. 143]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 19,628

HELEN MAXINE LEVI TRAVIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—November 19, 1965

Appeal from the United States District Court for the Southern District of California Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is .....

Filed and entered Nov. 19, 1965.

[fol. 144]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—
January 4, 1966

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed December 17, 1965, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 145] Clerk's Certificate (omitted in printing).

[fol. 146]

SUPREME COURT OF THE UNITED STATES

No. 963, October Term, 1965

HELEN MAXINE LEVI TRAVIS, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—April 18, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1965

No. ~~[illegible]~~ 67

HELEN MAXINE LEVI TRAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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86th Congress, 1st Session, S. 2095 20
86th Congress, 1st Session, S. 2287 20
87th Congress, 1st Session, House Report, pp. 388, 935, 973, 1086, 2485 20
88th Congress, 1st Session, House Report, pp. 2559, 8652 20
87 Congressional Record, p. 5052 14
87 Congressional Record, pp. 5047-5053, 5325-5326, 5385-5389 14
87 Congressional Record, pp. 5325-5326, 5386, 5048-5053, 5386-5388 14
104 Congressional Record, p. 13062 19
22 Department of State Bulletin, p. 399 15
24 Department of State Bulletin, p. 932 15
26 Department of State Bulletin, p. 7 15
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33 Department of State Bulletin, p. 777 17

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34 Department of State Bulletin, pp. 247-248 ..... 17, 18

35 Department of State Bulletin, p. 756 17

4 Federal Register, p. 3892 15

6 Federal Register, p. 6069 26

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House Report 485, 65th Congress, 2nd Session, pp. 2, 3 14

House Report 1365, 82nd Congress, 2nd Session, p. 53 13

House Report, p. 2468 20

House Report, p. 5455 20

House Report, p. 7315 20

House Report, p. 8329 20

House Report, p. 8655 20

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House Report, p. 9069 20

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Senate Report 431, 65th Congress, 2nd Session 14

Senate Report 444, 77 Congress, 1st Session, pp. 1, 2 14

3 United States Code Congressional and Administrative News, 85th Congress, 2nd Session, p. 5465 19

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United States Code, Title 28, Sec. 1254(1) 2

United States Constitution, First Amendement..4, 11, 30

United States Constitution, Fifth Amendment 4

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3 Hackworth, Digest of International Law (1942), p. 526 15

3 Hackworth, Digest of International Law (1942), p. 530 .....15, 16

IN THE

Supreme Court of the United States

October Term 1965
No. .....

HELEN MAXINE LEVI TRAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered and entered in the above-entitled cause on November 19, 1965.

Opinions Below.

The memorandum opinion of the District Court [R. 117][1] is not reported; it appears herein in Appendix A. The Opinion of the Court of Appeals [R. 140] is not yet reported; it appears herein in Appendix B.

Jurisdiction.

The Opinion and Judgment of the Court of Appeals were entered November 19, 1965. [R. 139-143.] A timely petition for rehearing was filed December 17, 1965, and

[1]Signifying Transcript of Record, page 117.

was denied on January 4, 1966. [R. 144.] The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Statutory Provisions Involved.

The statutory provision involved herein is 8 U.S.C. Sec. 1185 (Sec. 215, Imm. and Nat. Act of 1952, 66 Stat. 190) (hereinafter referred to as Section 1185), which appears herein in Appendix C. The regulation involved herein is State Department Regulation No. 108.-456, 26 Fed. Reg. 482, 22 C.F.R. Sec. 53.3 (hereinafter referred to as the "Excluding Cuba" regulation), which appears herein in Appendix D. (For convenience, 22 C.F.R. 53.1, 53.2 and 53.3 as existing prior to the "Excluding Cuba" regulation also appear herein in Appendix E.) Public Notice 179 (26 Fed. Reg. 492) and Press Release No. 24 (44 Dept. St. Bull. 178), issued by the State Department concurrently with the "Excluding Cuba" regulation, appear herein as Appendices F and G, respectively.

Presidential Proclamation No. 3004 (January 17, 1953, 67 Stat. C31) issued under Section 1185 and to give that statute effect, appears herein in Appendix H. Presidential Proclamation No. 2914 (December 16, 1950, 64 Stat. A454), referred to in Proclamation No. 3004, appears herein as Appendix I.

Questions Presented.

Involved at bar is the important question of statutory and Constitutional law—*expressly reserved* by this Court in the *civil* case of *Zemel v. Rusk*, May 3, 1965, 381 U.S. 1, 12, 18-20—whether the 1961 administrative ban on travel to Cuba can be given *criminal sanction*.

More completely stated, the question is whether the 1961 "Excluding Cuba" regulation (Regulation No. 108.456, 26 Fed. Reg. 482, 22 C.F.R. Sec. 53.3), eliminating Cuba from the area for which passports are not required and requiring a special validation, allowable only in total discretion, for travel thereto, can support a *criminal* prosecution under 8 U.S.C. Sec. 1185 for a claimed violation thereunder, including under that fundamental question the following subordinate issues:

1. Whether Section 1185 (as distinct from 22 U.S.C. Sec. 211a, the Passport Act of July 3, 1926, 44 Stat. 887, involved in *Zemel v. Rusk*) grants statutory authority, backed by *criminal* sanction, for an area restriction upon travel such as the "Excluding Cuba" purported regulation;
2. Whether such regulation can be enforced with *criminal* sanctions under Section 1185 although the said regulation was *expressly* not promulgated under authority of Section 1185 but only under authority of 22 U.S.C. Sec. 211a, which bears *no criminal sanction;*
3. Whether in light of point (2) and of issues involved in point (1) hereinafter detailed under Point I below, Section 1185 and the "Excluding Cuba" regulation if construed to impose such criminal sanctions violate due process of law for vagueness, contradiction and misleading terms in the communication of a criminal command;
4. Whether Section 1185 if construed to authorize issuance thereunder of criminal area travel prohibitions unconstitutionally delegates legislative power without adequate or any standards; and

5. Whether Section 1185 and the "Excluding Cuba" regulation, if construed to authorize a criminal restraint against travel to Cuba as below, including particularly restraint whereunder special validation for such travel is allowable only under unconfined, absolute discretion, deprives petitioner of personal liberty and of freedom of speech, thought and association contrary to the First and Fifth Amendments.

Also involved is whether Section 1185 and the "Excluding Cuba" regulation can properly be applied to a departure not directly to Cuba but only to Mexico, with application to Cuba for permission to enter being made only *after*, not prior to, United States departure.

Finally, there is tendered the continuing validity and effectiveness of Presidential Proclamations Nos. 3004 and 2914.

Statement of the Case.

Petitioner was convicted below on two counts for claimedly violating Section 1185, and the "Excluding Cuba" regulation under it, under an indictment charging that upon two occasions, on January 22, 1962 and on August 18, 1962, petitioner "did . . . depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico . . ." [R. 2-4.]

Section 1185 provides in core that after a presidential declaration of emergency (proclaimed in Presidential Proclamation No. 3004)[2] it shall be a crime for any person "to depart from or enter, or attempt to depart

[2]Proclamation No. 3004, 67 Stat. C31, was proclaimed January 17, 1953. It is disputed under Point VII hereunder that it was still valid and effective at the time of petitioner's acts of travel below (1962).

from or enter, the United States unless he bears a valid passport."

The "Excluding Cuba" regulation (Regulation No. 108.456, January 16, 1961, 26 Fed. Reg. 482, 22 C.F.R. Sec. 53.3) amends former 22 C.F.R. Sec. 53.3 to eliminate Cuba from the Western hemisphere area to which travel may be undertaken without a passport. Concurrently, on the same day, the Secretary of State also issued Public Notice 179 (26 Fed. Reg. 492) providing no passport would thereafter be valid for travel to Cuba "unless specifically endorsed for such travel," and Press Release No. 24 (44 Dept. St. Bull. 178) advising that "exceptions" allowing issuance of passports valid for Cuba would be made by the Secretary—but only where regarded by him "as being in the best interests of the United States . . ."

None of these "Excluding Cuba" public acts and documents—Regulation No. 108.456, Public Notice 179 or Press Release No. 24—cited or referred to Section 1185 in any way as authorizing authority. *To the contrary, both* Regulation No. 108.456 and Public Notice 179 *expressly* cited the *civil* Passport Act of 1926 (Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. Sec. 211a), a statute imposing *no criminal penalty* for violation of regulations issued under its authority, as their *sole* promulgative authority.

Thus the promulgative paragraph of Regulation No. 108.456, excerpted for clarity, recites expressly the authority of the Act of July 3, 1926 (22 U.S.C. Sec. 211a), stating:

> "Pursuant to the authority vested in me by . . . the Act [of] July 3, 1926 . . . I hereby amend paragraph (b) [of 22 C. F. R. 53.3] as follows . . ." (26 Fed. Reg. 482.)

In similar manner, Public Notice 179 states simply:

> "Therefore pursuant to the authority vested in me by [22 C. F. R. 51.75 and 51.77] issued . . . under authority of . . . the Act [of] July 3, 1926 . . . all United States passports are hereby declared . . ."

There are no disputed facts at bar. Petitioner was tried by the court with a jury waived, upon an agreed "Stipulation of Facts." [R. 63-66.]

The Stipulation of Facts recites that petitioner at all material times was and is a citizen [Stipulation of Facts, R. 63-66, par. 2]; that at all material times she knew the provisions of Section 1185 and of 22 C.F.R. Secs. 53.2 and 53.3 (par. 11); that at all material times she did not possess a valid United States passport specifically endorsed for travel to Cuba (par. 11); and that on January 22, 1962 and on August 18, 1962 petitioner "intentionally left and departed from the United States" by plane on the first date and by automobile on the second date. (Pars. 4 and 7.)

The Stipulation recites that defendant did not in either instance depart directly for Cuba but rather for Mexico, intending in each instance to seek permission to travel to Cuba only after her arrival in Mexico.

In each instance defendant entered Mexico upon a tourist permit issued by that country's government, and at the time of departing "intended to seek permission from representatives of the Republic of Cuba in Mexico, D. F., to visit Cuba." At the time of each departure from the United States she "did not have Cuba's per-

mission to enter Cuba" and she obtained that permission only after arrival in Mexico. (Pars. 4 and 7.) On the first occasion that permission was obtained four days after arrival in Mexico City, and on the second, twelve days after such arrival. (Pars. 4 and 7.) After the requisite permission had been obtained for entry into Cuba, petitioner traveled from Mexico City to Cuba by plane. (Pars. 5 and 9.)

After her arrival in Cuba on each of her said journeys thereto petitioner travelled in and about Cuba observing "the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health" and in the course of such travels took a number of pictures of which Exhibits 1A to 1M are representative. (Par. 12.) Upon her return to the United States and to her home in Los Angeles, California, petitioner appeared before "various groups and gatherings of her fellow citizens" and reported to them her observations upon her travels in Cuba and showed her photographs, Exhibits 1A to 1M. In addition petitioner wrote descriptions of her trips and her observances in Cuba which she disseminated by mail to friends and acquaintances and the copy of her letter dated February 28, 1962, Exhibit 2, is representative of such materials. (Par. 13.) The Stipulation of Facts and Exhibits 1A to 1M and 2 were duly admitted in evidence. [R. 67.]

By a written motion to dismiss the indictment [R. 6] and by an oral motion for judgment of acquittal [R. 67], each supported on leave by written briefs [R. 8, 68], petitioner challenged in the trial court the statute and the regulations, on their face and as applied, upon grounds substantially as expressed herein in the statement of Questions Presented above. Both said motions were denied. [R. 55-61; R. 117-124.] Petitioner was adjudged guilty on both counts of the indictment and was sentenced on each count to a fine of $500 and to six months imprisonment, suspended on probation. [R. 125.]

On Appeal the Court of Appeals affirmed. [R. 139-143.] A timely petition for rehearing was filed December 17, 1965 [R. 144], and was denied January 4, 1966. [R. 144.][3]

[3]A parallel prosecution of four defendants under Section 1185 for conspiracy and for travel to Cuba in 1963 without specially validated passports is presently pending in the United States District Court for the Eastern District of New York, *United States v. Lee Levi Laub, et al.*, No. 64 CR 137. Constitutional and statutory challenges to the prosecution there have not yet been determined.

REASONS FOR GRANTING THE WRIT.

Introduction.

Tendered in the case at bar, as developed in detail hereafter, are issues of statutory and Constitutional law and of public policy of far reaching national importance affecting the question—expressly reserved by this Court in *Zemel v. Rusk,* 381 U.S. 1—whether the Department of State by administrative ban can *criminally prohibit* travel by American citizens to designated world areas—in this case, travel to Cuba.

In *Kent v. Dulles,* 357 U.S. 116, this Court distinguished (pp. 120-123) between the *two* separable functions of passports—the first as a *civil* diplomatic act of granting or withholding diplomatic requests for safe passage, and the second as an instrument of *criminal* exit-control. *Zemel v. Rusk* dealt with the *civil* right to a passport for Cuban travel and held as to that matter —the *civil* withholding of request for safe-passage—22 U.S.C. Sec. 211a (the Passport Act of July 3, 1926) granted the Secretary authority to impose area travel restrictions and thereunder to refuse to issue Cuban travel passports. However, this Court there *expressly* reserved the question "whether [a person] can be criminally prosecuted under . . . 8 U.S.C. Sec. 1185(b) . . . for travel in violation of an area restriction," declaring that resolution of that criminal exit-control question "must await a concrete fact situation." (381 U.S. at pp. 18 and 20.)

The instant case presents that reserved question and poses that "concrete fact situation."

Involved at bar, first, is the serious question of statutory construction and policy whether Section 1185 au-

thorizes criminal punishment for travel in disregard of administrative area restrictions. The court below, implicitly upon the authority of *Zemel v. Rusk*, has held Section 1185 authorizes and provides such criminal sanction for violations of area restrictions, although the legislative history of the statute, and the consistent administrative construction of it and of its two predecessor statutes, demonstrate the statute was not intended to, and has uniformly been conceived and construed not to, convey such authority and to be inapplicable and irrelevant to area travel restrictions. *Zemel v. Rusk*, as observed above, involved only the *civil* base for area restrictions and expressly reserved the criminal base question posed here.

Also involved at bar is a grave conflict with due process fundamentals under the void-for-vagueness doctrine. The legislative and administrative history of Section 1185 and its predecessors not merely discloses that area restrictions have always been cast in civil terms and context only and never predicated upon Section 1185 or its predecessors, but discloses further that on two explicit occasions (and many more implicit ones) the Department of State has publicly and officially announced that area restrictions do not "forbid" affected travel and do not make such travel punishable criminally. area restriction (the "Excluding Cuba" regulation) is Added to this is the circumstance that the instant *expressly* promulgated *not* under Section 1185 but under a *civil statute* (22 U.S.C. Sec. 211a) bearing no provision for criminal punishment for violation of regulations issued under it. To enforce the instant area restriction as criminally punishable under Section 1185 in the case at bar, therefore, does violence to the consist-

ent due process decisions of this Court prohibiting contradictory, misleading or ambiguous terms in the communication of a criminal command. (*Raley v. Ohio*, 360 U.S. 423, 438; *Cox v. Louisiana*, 379 U.S. 559, 571; *Johnson v. United States*, 318 U.S. 189, 197; *United States v. Cardiff*, 344 U.S. 174, 176; *Jones v. United States*, 362 U.S. 257, 262-263; *Scull v. Virginia*, 359 U.S. 344, 353; *Quinn v. United States*, 349 U.S. 155, 166.)

The liberty put at stake at bar—freedom to travel—is a liberty "basic in our scheme of values" and one "closely related to the rights of freedom of speech and association." (*Kent v. Dulles*, 357 U.S. 116, 126; *Aptheker v. Secretary of State*, 378 U.S. 500, 517.) A decision, as below, subjecting such liberty to *criminal* administrative area prohibitions and restrictions poses deep-cutting Constitutional questions under the due process clause and under the First Amendment. Particularly so with the instant regulation and its feature of arbitrary, censorial licensing power in the provision vesting in the Department power to permit special license for travel to Cuba to "persons whose travel may be regarded as being in the best interests of the United States." (*Cox v. Louisiana*, 379 U.S. 536, 555-557; *Thornhill v. Alabama*, 310 U.S. 88, 97; *Kunz v. New York*, 340 U.S. 290, 294; *Saia v. New York*, 334 U.S. 558, 560-561; *Niemotko v. Maryland*, 340 U.S. 268, 271-272; *Cantwell v. Connecticut*, 310 U.S. 296, 305-307; *Largent v. Texas*, 318 U.S. 418, 422.)

Also posed in the instant case are the questions of unconstitutional delegation of legislative powers under Section 1185 and the question of the continuing effectiveness and validity of the proclamations of emergency required to bring the statute into operation.

The decision of the Court below, resolving all of the above questions in favor of state power, is expressed in but a three-page *per curiam* opinion. The opinion does not discuss directly or in any detail the statutory, Constitutional and policy questions raised but implicitly dismisses them all upon authority only of *Zemel v. Rusk* —although, as stated above, *Zemel v. Rusk* dealt only with the *civil* side of area restrictions and *expressly* reserved decision as to the *criminal-sanction* questions arising here.[4] It is respectfully submitted that in resolving all of the statutory, Constitutional and policy questions tendered at bar in favor of state power and in upholding criminal punishment for a violation of the Cuban area travel restriction, the Court below has decided important Federal questions which have not been, but should be, settled by this Court and has determined like questions in a manner in conflict with applicable decisions of this Court, all as developed in detail below, and certiorari, therefore, should be allowed.

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[4]The opinion below also cited *United States v. Healy*, 376 U.S. 75, 82, N. 7; *Worthy v. Herter* (C. A. D. C., 1959) 270 F. 2d 905, 912; *Porter v. Herter* (C. A. D. C., 1960) 278 F. 2d 280, 282 and *Worthy v. United States* (C. A. 5, 1964) 328 F. 2d 386. The footnote cited in *United States v. Healy* is but a passing *dicta* statement without consideration of the questions of Constitutional and statutory power and of policy expressly reserved in the subsequent decision in *Zemel v. Rusk*. *Worthy v. Herter* and *Porter v. Herter* are *civil* power cases only, and hence like *Zemel v. Rusk* are nondecisive here. *Worthy v. United States* is the only criminal area-restriction case among the cited decisions and it held *in favor of the defendant*, ruling Section 1185 unconstitutional in attempting to prohibit *entry* to the United States by a citizen after travel to Cuba without a special passport.

I.

Congress Did Not by Section 1185 Authorize Issuance of Criminal-Sanction Area Travel Bans.

The legislative history of Section 1185 and of its two exact border-control predecessor statutes (Act of May 22, 1918 and Act of June 21, 1941) and the record of area restrictions and of Executive acts and declarations relating thereto undertaken both before and since enactment of Section 1185, make plain that Section 1185 was not intended to, and by construction has uniformly been recognized not to, authorize issuance under it of criminal-sanction area travel bans.

(1) The legislative history of Section 1185 is the legislative history of its two *exact* predecessor statutes,[5] the Act of May 22, 1918, 40 Stat. 559, and the Act of June 21, 1941, 55 Stat. 252. That history demonstrates the legislative purpose was to impose *border control* only, not to institute or authorize area or geographical travel restraints. There is nothing in the terms of the statutes suggesting area restraints and the legislative history expresses affirmatively a purpose only to impose entry and exit control as to spies and persons fleeing or violating the law—that is to impose regulation as to *travelers*, not as to *destinations*.

The Senate debates on the enactment of the original parent act, the Act of May 22, 1918, declare its "chief object" was to scrutinize and impose control upon "aliens and alien enemies and renegade citizens" engaging

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[5]The only legislative history as to Section 1185 itself is the simple statement in the House Report respecting it stating its provisions "are incorporated in the bill in practically the same form as they now appear in the Act of May 22, 1918 [as amended by the Act of June 21, 1941]." (H. Rep. 1365, 82nd Cong., 2d Sess., p. 53.)

in or subserving espionage and who "can now enter and depart without any power . . . to intercept or delay them." (56 Cong. Rec. 6192; see also p. 6029.) In like manner, the House debates on the enactment of the Act of June 21, 1941 declare its "sole purpose" was to impose "a sort of clearing house" over persons entering and leaving the country to ascertain "their reasons why they were going or coming . . . and whether they were engaged in espionage [or law violations]." (87 Cong. Rec. 5052.)

Over and over again in the debates as to both the 1918 and 1941 Acts there is reiterated the purpose of *border control*—to seal and control the points of entry and exit against espionage agents and law violators by requiring passports for passage and identification.[6] *Never* as to either Act is there suggestion of intent to impose or authorize *area* prohibitions or restrictions.[7]

(2) Moreover, the limiting import of the foregoing legislative history indicating that Section 1185 and its predecessors were not intended to authorize criminal area travel restrictions is corroborated by the record of area restrictions and of Executive acts and declarations relating thereto undertaken both before and since enactment of Section 1185. That record shows that area re-

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[6]Thus as to the 1918 Act see: 56 Cong. Rec. 5970, 6029-6031, 6066-6067, 6191-6192; see also H. Rep. No. 485, 65th Cong. 2d Sess. at pp. 2, 3; S. Rep. No. 431, 65th Cong. 2d Sess., *passim;* see also the President's Message to Congress of December 4, 1917, 56 Cong. Rec. 18, 20.

As to the 1941 Act see; 87 Cong. Rec. 5325-5326, 5386, 5048-5053, 5386-5388; S. Rep. No. 444, 77 Cong. 1st Sess., at pp. 1, 2.

[7]As to the 1918 Act see: 56 Cong. Rec. 5969-6068, 6191-6195, 6235, 6246-6248; H. Rep. No. 485, 65 Cong. 2d Sess., *supra*; S. Rep. No. 431, 65th Cong. 2d Sess., *supra*.

As to the 1941 Act see: 87 Cong. Rec. 5047-5053, 5325-5326, 5385-5389; S. Rep. No. 444, 77th Cong. 1st Sess., *supra*.

strictions where undertaken were always and unvaryingly undertaken as *civil* safe-passage-withdrawal acts only, never as criminal travel prohibitions, and Section 1185 and its predecessors were never referred to or invoked as even relevant thereto. It was not conceived that Section 1185 or either of its predecessors authorized issuance thereunder of criminal-sanction area restraints.

(a) Prior to enactment of Section 1185 (June 27, 1952) the Secretary of State on a dozen occasions beginning as early as 1914 proclaimed area restrictions as to passport rights because of war or diplomatic considerations [1914, restrictions as to Europe (Hearings, 85th Cong.[8] 63-64); 1915, restriction as to Belgium (3 Hackworth[9] 526); 1919, restriction as to Germany (*id.*, p. 530); 1935, restriction as to Ethiopia (*id.*, pp. 531-532); 1936, restriction as to Spain (*id*, pp. 533-534); 1937, restriction as to China (*id.* pp. 532-533); 1939, restriction as to Europe (*id.* pp. 534-535; 4 Fed. Reg. 3892); 1949, restriction as to Hungary (22 Dept. St. Bull. 399); 1951, restriction as to Czechoslovakia (24 Dept. St. Bull. 932); 1951, restriction as to Hungary (26 Dept. St. Bull. 7); 1952, restriction as to Eastern European Countries, China and the Soviet Union (26 Dept. St. Bull. 736)]. Of these restrictions five (the third, and the last four) were proclaimed during periods of the full operative effect of the two statutory predecessors of Section 1185, the Acts of May 22, 1918 and June 21, 1941 (*i.e.* in the periods 1918-1921

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[8]Hearings before the Committee on Foreign Relations on Department of State Passport Policies, United States Senate, 85th Cong., 1st Sess., hereinafter cited as Hearings, 85th Cong.

[9]Hackworth, Digest of International Law (1942), hereafter referred to as Hackworth.

and 1941-1952).[10] Yet *all* of the restrictions *unfailingly* were conceived and expressed *solely* in *diplomatic, safe-passage terms*. In not *one* of them—even during periods of the full operative effect of the predecessor statutes of Section 1185—is there even a *suggestion* that the restrictions imposed were or could be issued under or be given criminal sanction by the predecessor statutes of Section 1185.

In some of the examples, moreover, the civil, safe-passage nature of the restrictions is made particularly explicit. In the 1919 restriction against travel to Germany, for example, despite announcing it was "no longer issuing or authorizing . . . passports for Germany", the State Department nonetheless stated as to travelers disregarding its ban merely that such persons would "go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions." (3 Hackworth 530.) Although the 1918 Act predecessor to Section 1185 was then in full force and effect no slightest reference to it was made.

The most revealing of all of the area restrictions preceding the enactment of Section 1185 is the 1952 proclamation relating to travel to East European countries, China and the Soviet Union. There the State Department announced it would thenceforth "stamp all passports not valid" for travel to such countries "unless specif-

[10]The 1918 Act was in effect by Presidential proclamation only between August 8, 1918 and March 3, 1921. (40 Stat. 1829 and 41 Stat. 1359.) The 1941 Act was in effect by successive Presidential proclamations and Congressional extensions from November 1941 (55 Stat. 1696) to April 1, 1953 (66 Stat. 54, 57, 96, 137, 330, 333) by which date Section 1185 was already in effect by Presidential Proclamation 3004, January 17, 1953 (67 Stat. C31).

ically endorsed . . . for such travel." *However,* the Department's official Press Release establishing the restriction was explicit also in stating, "In making this announcement, the Department *emphasized* that *this procedure in no way forbids American travel to those areas.*" (26 Dept. St. Bull. 736, emphasis added.) The Press Release stated the Department's action represented only a "taking [of] additional steps to warn American citizens of the risks of travel in Iron Curtain countries . . ." (*Id.*).

(b) The uniform recognition by the State Department during the long historical period preceding enactment of Section 1185 that the area restrictions issued by it concerned only the diplomatic, safe-passage side of the passport powers and did not relate to criminal exit-control under the predecessor statutes to Section 1185, has continued and even been underscored since enactment of Section 1185 to and until the very recent present.

Since enactment of Section 1185 (June 27, 1952) and prior to the "Excluding Cuba" regulation at bar, the State Department proclaimed area travel restrictions on three new occasions [1955, restriction as to Albania, Bulgaria, China, North Korea and North Viet Nam (33 Dept. St. Bull. 777); 1956, restriction as to Hungary (34 Dept. St. Bull. 247-248); 1956, restriction as to Egypt, Israel, Jordan and Syria (35 Dept. St. Bull. 756)]. Again, despite the full operative effect at all times of Section 1185 these proclamations unvaryingly sounded in diplomatic, safe-passage terms only; never was there even a suggestion that the restrictions were or could be issued under or be given criminal exit-control sanction by Section 1185.

Thus, in illustration, the 1956 restriction as to travel to Hungary stated merely that the Department "is unwilling" "either to encourage or facilitate the travel of American citizens to Hungary", and that passports would not be valid for travel thereto unless specially validated. No mention of Section 1185 or of its sanctions is made, despite its full operative effectiveness at the time. (34 Dept. St. Bull. 247, 248.)

In 1957 the Senate Foreign Relations Committee, noting the Department had stated (as excerpted above) that its area restrictions "in no way forbi[d]" travel to affected countries and that despite area restrictions many persons had travelled in disregard thereof without any enforcement of any sort being attempted, asked the Department *directly* whether the stamping of a passport "not valid for travel to country X" means the United States *"withdraws its protection"* from such travel, or means the United States *"prohibits* the person from going to country X?" (Hearings, 85th Cong., *supra,* p. 59, emphasis added.) The Department replied that such restrictive stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be violating the criminal law."* (*Id.,* emphasis added.) The Department said there were criminal laws "which might well be violated *in the course* of such travel", mentioning "e.g. the Trading with the Enemy Act," but the mere travel to the named country *in se* would be no crime. *No mention or citation was made of Section 1185 as even relevant to the issues posed.*

Surely had the Department truly conceived that Section 1185 applied to make penal a mere leaving of the United States to go to "country X", *it would have said so.* In the premises its silence is eloquent testimony that in truth it viewed its area restrictions as civil, safe-passage measures only, not as criminal-sanction measures of exit control.

Finally, repeated recent endeavors by the Executive to obtain from Congress an explicit statutory base to attach criminal penalties to area travel restrictions, and Congress' consistent rejection of all such endeavors, corroborates further that Section 1185 does not now provide such a base and Congress is as yet unwilling to enact one. Thus in 1957 an authoritative report of the Commission on Government Security, issued pursuant to Public Law 304, 84th Congress, 1st Sess., 69 Stat. 595, as amended, expressly recommended the amendment of Section 1185 "to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid." (Report, p. 475.) In 1958, responsive to the foregoing and to this Court's restrictive decision in *Kent v. Dulles, supra,* 357 U.S. 116, President Eisenhower recommended passage by Congress of legislation to provide, among other things, for "clear statutory authority to prevent Americans from using passports to travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States." (July 7, 1958, 104 Cong. Rec. 13062, House Document No. 417; 3 U.S. Code Cong. and Admin. News, 85th Cong. 2d Sess., at p. 5465.) The President's request was embodied in a proposed bill, introduced in the 85th Con-

grees, 1st Session as S 4110, which was thereafter followed by numerous similar bills in that and successive Congresses.[11] To date Congress has consistently failed to adopt these proposals.

All of the foregoing legislative and administrative history combines to establish four decisive things as to Section 1185. First, the history shows that Section 1185 was adopted by Congress on representations that it was to serve limited (border control) purposes only and without suggestion of authorization for criminal-sanction area restrictions. Second, the history show that the Department has uniformly cast area restrictions as *civil* acts only, and has consistently construed Section 1185 and its predecessors as inapplicable and irrelevant thereto. Third, the history reveals two express declarations by the Department—one to the people and one directly to an agency of the Congress—officially advising that area restrictions do not "forbid" free travel and are not criminal in character. Finally, the history is climaxed and completed by repeated requests by the Department of Congress that it enact a law to make violations of area restrictions crimes—requests which Congress has in all cases declined. All of this establishes a *compelling* record of administrative construction, with congressional acquiescence, that Section 1185 does not authorize issuance under its authority of criminal-sanction administrative area travel prohibitions.

The Court below did not consider or respond to any of the foregoing considerations of legislative and adminis-

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[11]See *e.g.* 85th Congress, 1st Sess.,: S. 2770, H.R. 8655; 85th Cong., 2d Sess.,: S. 3344, 4030, 4110, H.R. 13005, 13318; 86th Cong., 1st Sess.,: S. 1303, 2095, 2287, H.R. 2468, 5455, 7315, 8329, 8930, 9069; 87 Cong., 1st Sess.,: H.R. 388, 935, 973, 1086, 2485; 88th Cong. 1st Sess.: H.R. 2559, 8652.

trative history respecting Section 1185 and its inapplicability to lend criminal sanction to area travel restrictions. The decision below contented itself with observing that: "Area restrictions have long been used and are recognized as valid", citing merely *Zemel v. Rusk*. But *Zemel v. Rusk*, as heretofore noted, expressly forbore from determining the applicability of Section 1185 to area restrictions, and the history tendered here was not examined or evaluated there.

II.

To Enforce the "Excluding Cuba" Regulation Under Section 1185 With Criminal Sanctions in the Premises at Bar Would Violate Due Process for Vagueness, Contradiction and Misleading Terms in the Communication of a Criminal Command.

Enforcement of the "Excluding Cuba" regulation as a *criminal* prohibition under Section 1185 in the premises at bar would offend due process fundamentals against vagueness, contradiction and misleading terms in the communication of a criminal command.

In light of the matters set forth in Point I above, consider the position of the citizen. He looks first to the terms and legislative history of Section 1185; he finds there no intent to authorize area restrictions but only an intent to impose *border control*—to regulate *travelers*, not *destinations*.

He turns then to history and to precedent. Here he finds that all previously issued area travel restrictions have sounded only in *civil* terms, that is in terms of safe-passage withdrawal, never in terms of criminal prohibition. Not once, he finds, has there been even a

suggestion that any of the prior restrictions were or could have been issued with criminal exit-control sanctions under Section 1185 or either of its predecessor statutes.

Moreover, here he finds also affirmative, authoritative administrative *disclaimers* of criminal sanctions. Here he finds the Department of State itself declaring that area restrictions "in no way *forbi*[*d*]" free travel in violation of their terms but constitute merely "additional steps to warn American citizens of the risks of [unsanctioned] travel," and declaring further upon official inquiry from the United States Senate that disapproved travel *in itself* constitutes *no crime* though "there are laws which might well be violated *in the course of* such travel."

All of these matters of record tell the citizen that travel to the disapproved areas is not regarded as a crime. To prosecute thereafter turns this contrived structure of administrative regulations into a trap even for the wary. To suffer criminal conviction in such premises "would be to sanction and indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." (*Raley v. Ohio,* 360 U.S. 423, 426; *Cox v. Louisiana,* 379 U.S. 559, 571; *Johnson v. United States,* 318 U.S. 189, 197; *United States v. Cardiff,* 344 U.S. 174, 176.)

Moreover, all of the foregoing circumstances are climaxed finally by the promulgation clause of the "Ex-

cluding Cuba" regulation which *expressly* declares (as developed in Point III hereafter) that that regulation is issued "pursuant to the authority" *not* of Section 1185 but of "the authority of . . . the Act of . . . July 3, 1926, 22 U.S.C. Sec. 211a," *a statute imposing no criminal sanctions for violations of regulations issued under it.*

In all of these premises it appears difficult to deny that petitioner, or any other citizen, might reasonably read the "Excluding Cuba" regulation in the light of *all of these circumstances as communicating no criminal-sanction area travel prohibition.* Petitioner was misled. She did not reach the wrong interpretation of the regulatory maze. Rather the Government reversed its field by professing to impose no criminal sanction and after reliance thereon doing the very opposite. Due process forbids contradictory, misleading or vague criminal commands. (*Jones v. United States*, 362 U.S. 257, 262-263; *United States v. Cardiff*, 344 U.S. 174, 176.)

"Fundamental fairness" requires an accused not be held to account "for a crime he could not with reasonable certainty know he was committing"; he must not "be misled" but must be "clearly apprised" by the law of its command. (*Scull v. Virginia*, 359 U.S. 344, 353; *Johnson v. United States*, 318 U.S. 189, 197; *Quinn v. United States*, 349 U.S. 155, 166.)

Before a citizen can be convicted of a crime he must be made to *know* by Government that his act is *criminally prohibited;* without such awareness his state of

mind lacks punishable *scienter*. (*Morissette v. United States*, 342 U.S. 246; *Lambert v. California*, 355 U.S. 225; *Smith v. California*, 361 U.S. 147, 150-151.)

On the issue here concerned the Court below erroneously misread a stipulation that petitioner "knew" the contents of Section 1185 and of the "Excluding Cuba" regulation as signifying petitioner knew the intended meaning thereof claimed by the Government. There was no stipulation as to *meaning* at all, only a stipulation of knowledge as to *terms*. The Court below stated,

> "A reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport. That Appellant knew *this* is agreed in the stipulation." [R. 142, emphasis added.]

The true stipulation was only that petitioner "knew the provisions of Section 1185(b) of Title 8, United States Code, and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations." [R. 65, lines 24-26.] This does not at all stipulate to the meaning or effect of the statute or regulation as claimed by the Government, and the erroneous conclusion to the contrary by the Court below leaves unconsidered below[11a] petitioner's *serious* claim here that the statute and regulation violate due process because of vagueness, contradiction and misleading terms in the communication of a criminal command.

[11a] This oversight, indeed, was pointed out to the Court below in the Petition for Rehearing filed below, but rehearing was denied without comment.

III.

The "Excluding Cuba" Regulation Was Not Promulgated Under Section 1185.

Even if it be assumed that Section 1185 authorizes issuance of criminal area restrictions under its authority, violation of the "Excluding Cuba" regulation can be no crime because that regulation was promulgated *expressly* under the authority *only* of 22 U.S.C. Sec. 211a, Act of July 3, 1926, *not* under Section 1185.

The penalty-imposing portion of Section 1185 provides punishment only for "Any person who shall willfully violate any of the provisions of this section, or . . . of any . . . regulation issued therunder . . ." (8 U.S.C. Sec. 1185(c).) Contrasted with Section 1185, 22 U.S.C. Sec. 211a, Act of July 3, 1926 (44 Stat. 887), provides no criminal penalty for violation of regulations issued under it.

The promulgative paragraph of the "Excluding Cuba" regulation (Regulation No. 108.456, 26 Fed. Reg. 482), excerpted for clarity, invokes *expressly* the authority of the *Act of July 3, 1926, not of Section 1185,* stating:

> "Pursuant to the authority vested in me by . . . the Act [of] July 3, 1926 . . . I hereby amend paragraph (b) [of 22 C. F. R. 53.3] as follows . . ." (26 Fed. Reg. 482.)[12]

[12]Following the body of the Amendment in its official version in 26 Fed. Reg. 482 Section 1185 does appear in lesser type and in parenthesis but that Section is *not* referred to in the promulgating clause.

Public Notice 179 issued concurrently with Regulation No. 108.456 and to apprise the public thereof is to like effect. It states:

> "Therefore pursuant to the authority vested in me by [22 C. F. R. 51.75 and 51.77] issued . . . under authority of . . . the Act [of] July 3, 1926 . . . all United States passports are hereby declared to be invalid . . ." (26 Fed. Reg. 492.)

Thus, even could it have been, the "Excluding Cuba" regulation was *not* issued or promulgated under Section 1185, but only under the Act of July 3, 1926, 22 U.S.C. Sec. 211a, a statute providing no criminal penalty for violations of regulations issued under it. Hence criminal enforcement cannot lie at bar. It is plain that criminal prosecution for violation of an administrative regulation can only be had where the regulation is issued under a statute providing for criminal punishment for violations of regulations issued under it.

On the issue here concerned the Court below observed only, "The 'Excluding Cuba' regulation is an *amendment* and as originally promulgated *22 C.F.R. 53.1-53.9 made specific reference to 8 U.S.C. Sec. 1185.*" (Emphasis added.) The circumstance, however, that the *original* regulations of 22 C.F.R. 53.1-53.9 *were* issued and promulgated under the authority and with the criminal sanction of Section 1185[18] does not reach, affect or cure the circumstance that the "Excluding Cuba" amendment *was not issued under such authority* but only under

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[18]Actually they were issued under the predecessor statutes of Section 1185, the Act of May 22, 1918, 40 Stat. 559, as amended by the Act of June 21, 1941, 55 Stat. 252, as was expressly recited in their promulgation clause, 6 Fed. Reg. 6069. They were adopted under Section 1185 by incorporation by reference in Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, par. 1.

authority of Section 211a, carrying *no power of criminal sanction.*

The issue is important and narrow and is a question of *authorizing power*. The authority of administrative officers to enact regulations with the force of criminal sanctions must be grounded in an *authorizing statute;* it is an awesome power and is strictly circumscribed. Accordingly, even to amend originally criminal regulations so that the amendment or change will also bear criminal force, the amendment must itself be duly issued under the authorization and authority of a statute providing criminal penalty for violation of regulations issued under it. Section 211a, under the authority of which *alone* the "Excluding Cuba" regulation was expressly issued, possesses and transmits no such authorizing power. Hence violation of that regulation can be no crime.

IV.

Construed to Authorize the "Excluding Cuba" Regulation at Bar, Section 1185 Unconstitutionally Delegates Legislative Power Without Adequate or Any Standards.

In *Zemel v. Rusk,* 381 U.S. 1, this Court upheld issuance of area travel restrictions under the *civil* authorizing statute 22 U.S.C. Sec. 211a (Act of July 3, 1926, 44 Stat. 887), holding that statute in authorizing such restrictions did not unconstitutionally delegate legislative power (although it embodied no statutory standards) because sufficient standards could be apprehended in prior administrative practice. The Court ruled that "the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Con-

gress in light of prior administrative practice.' . . . So limited, the Act does not constitute an invalid delegation." (381 U.S. 1, 17-18.)

At bar Section 1185 establishes *no* standards for issuance under *it* of area regulations and there can be no saving of the statute by recourse to prior administrative practice. This because, as heretofore seen, all administrative practice prior to enactment of Section 1185 in 1952 unites to demonstrate no area restrictions were ever attempted to be issued under the criminal sanctions of either of the predecessor statutes to Section 1185. All prior area restrictions were issued under the civil, safe-passage passport powers only and their issuance, in the Department's words, did not "forbid" free travel despite the restrictions.

Thus the prior practice proves not the prior reasonable exertion of criminal area-restriction powers but a *denial* and *disclaimer* thereof. Such a *negating* record clearly can afford no administrative base for supplying affirmative discretionary standards capable of adoption by Congress in the enactment of Section 1185.

V.

Construed to Authorize the "Excluding Cuba" Regulation at Bar, Section 1185 Deprives Petitioner of Personal Liberty and of Freedom of Speech, Thought and Association Contrary to the First and Fifth Amendments.

The liberty of individual citizens to travel freely to all parts of our world is, in this Court's words, "a part of our heritage"; it is "basic in our scheme of values." (*Kent v. Dulles*, 357 U.S. 116, 126.) It is, moreover, "a constitutional liberty closely related to the rights of

free speech and association" (*Aptheker v. Secretary of State*, 378 U.S. 500, 517), and its free exercise "'enables American citizens . . . to be well-informed on public issues,'" thereby "'contribut[ing] to sounder [democratic] decisions.'" (*Kent v. Dulles, supra*, 357 U.S. at pp. 126-127.)

It is true this Court in *Zemel v. Rusk, supra*, 381 U.S. 1, ruled the Department of State has Constitutional power to refuse to issue a passport valid for travel to Cuba under the *civil* safe-passage side of the passport powers. But involved at bar is a criminal prohibition, not a civil withdrawal of a protective privilege.

It is one thing to say that Government may determine to withdraw from specified parts of the world for reasons of foreign and diplomatic policy the privilege of the diplomatic safe-passage protection afforded by passports, and may require citizens if they travel to such areas to proceed on their individual responsibility only. It is another thing entirely to say that Government may outright prohibit *any* free travel to administratively-listed areas of the globe on pain of criminal punishment even as to citizens willing to travel without diplomatic passport protection. It is the latter which is involved here. That issue was expressly reserved in *Zemel v. Rusk*, and this Court should now affirm that under the Bill of Rights the Government may not thus prohibit and punish free travel.

Moreover, there is one feature of the "Excluding Cuba" regulation at bar *particularly* offensive to personal liberty and to freedom of speech, thought and association. Concurrent with the "Excluding Cuba"

regulation the Department of State issued Press Release No. 24 (44 Dept. St. Bull. 178) announcing that under the regulation *discretionary* validation of passports for travel to Cuba would be allowable—but *only* to "persons whose travel may be regarded as being in the best interests of the United States . . ."

This vests the Secretary with "completely uncontrolled discretion" to allow or disallow passports for Cuban travel at his license, enabling him in this area of sensitive, First-Amendment connected rights and liberties "to act as a censor," jeopardizing "the right of a person or group not to be denied equal protection of the laws." (*Cox v. Louisiana,* 379 U.S. 536, 555-557.) "It is clearly unconstitutional to enable a public official . . . to engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary licensing power" over First Amendment area rights. (*Id.* at p. 557; *Thornhill v. Alabama,* 310 U.S. 88, 97; *Kunz v. New York,* 340 U.S. 290, 294; *Saia v. New York,* 334 U.S. 558, 560-561; *Niemotko v. Maryland,* 340 U.S. 268, 271-272; *Cantwell v. Connecticut,* 310 U.S. 296, 305-307; *Largent v. Texas,* 318 U.S. 418, 422.)

A statute creating such arbitrary, censorial licensing power over freedom of speech, thought and association and related liberties is void upon its face and may be attacked by any citizen "whether or not he applied for a license." (*Freedman v. Maryland,* 380 U.S. 50, 56; *Staub v. City of Baxley,* 355 U.S. 313, 319; *Thornhill v. Alabama, supra,* 310 U.S. 88, 97.)

VI.

Petitioner Departed Not for Cuba but for Mexico, and Without Even Prior Request for Permission to Enter Cuba; Properly Construed and Constitutionally Limited, Section 1185 Does Not Reach Such a Departure.

When petitioner departed the United States on the dates charged in the indictment she went to Mexico, not to Cuba. Only *after* her United States departure, and *after* her arrival in Mexico in each instance, did she apply for and ultimately secure Cuban permission to enter Cuba. Accordingly, at the time of each of her "departures" from the United States she had no *ability* to, and she did not, "depart" without a passport from the United States *for* Cuba "a place outside the United States for which a valid passport is required" [Indictment; R. 2] within the meaning of Section 1185.

Section 1185 covers only *departure;* it operates only on the facts existing at the moment of such departure. Properly construed and Constitutionally limited, it cannot apply to the facts at bar. To say that departure can be rendered penal by a *subsequent* seeking and obtaining of permission to enter Cuba is to defy reason and to make the statute arbitrary and void in its application under due process fundamentals.

This may be illustrated by asking what would happen under the statute as the Government construes it if petitioner on arrival in Mexico and on requesting Cuban entry permission had been refused such permission, or, in Mexico, had requested and obtained permission to enter Cuba but because of other circum-

stances did not in fact travel there. By the Government's thesis the offense would nonetheless be complete because complete at the moment of departing, regardless of whether travel to Cuba should actually eventuate or not.

The Government's interpretation is unreasonable and arbitrary. The statute should be limited and construed not to apply to departures as at bar where at the time of departure there does not exist *ability* to enter (by existing permission) the country travel to which requires a passport not possessed.

VII.

No Sufficient Presidential Proclamation of Emergency Exists to Support the "Excluding Cuba" Regulation Under Section 1185 at Bar.

Section 1185 by its terms applies during peace time only "during the existence of any national emergency proclaimed by the President" and then only if the President finds and further proclaims "that the interests of the United States require" the imposition of additional entry and departure restrictions.

Presidential Proclamations Nos. 3004 and 2914 at bar do not supply a proper base under the foregoing requirements for enforcement of the "Excluding Cuba" regulation under Section 1185.

Firstly, Proclamation No. 3004 makes no proclamation of apprehended need for *geographical* area travel restrictions. Section 1185 is a criminal statute and must be narrowly construed, and its condition that departure restrictions must be found to be "require[d]" by "the interests of the United States" must be liberally en-

forced in favor of the accused, so as to require for area departure restrictions a finding of specific need for the particular restriction.

Secondly, both Proclamations Nos. 2914 and 3004 (issued December 16, 1950 and January 17, 1953, respectively) are bottomed on the existing emergency at the time of their proclamation of the Korean War; that foundational premise of both proclamations ceased with the end of that "war" emergency on July 27, 1953.

This Court is not bound by a decade-old declaration of a national emergency which is inapplicable to the present situation and no longer truly endures. It has the authority to inquire as to whether there is in fact such a national emergency in existence today which can support the restriction upon liberty of travel represented by the "Excluding Cuba" regulation. (*Chastleton Corp. v. Sinclair,* 264 U.S. 543, 547-548; *East New York Savings Bank v. Hahn,* 326 U.S. 230, 234-235; *Woods v. Miller,* 333 U.S. 138, 147, Mr. Justice Jackson concurring.)

Conclusion.

Wherefore, the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the District Court.

Memorandum Opinion on Finding Defendant Guilty as Charged.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Helen Maxine Levi Travis, Defendant. No. 32380-CD.

Defendant is indicted on two counts for violation of 8 U.S.C. § 1185(b). The violations consist of defendant knowingly and willfully departing from the United States for Cuba on January 22, 1962, and August 18, 1962, without a valid passport for such travel. It is agreed that on each departure defendant intended to go to Cuba and did go to Cuba. Each of defendant's trips to Cuba was accomplished by going to Mexico City with the intent to obtain authority of Cuban representatives in Mexico to visit Cuba. On each occasion this authority was obtained and, as noted above, Cuba was visited. Defendant urges that although she left the United States with the intent to go to Cuba, her entry into Cuba was dependent on receiving Cuba's permission after arriving in Mexico City and that to violate the statute here involved her departure from the United States must have been for a country which was ready to receive her. The case of *Heikkinen vs. U.S.*, 355 U.S. 273 at 276, and other authorities cited by defendant, do not appear to support this defense.

Section 1185(b) provides in pertinent part:

> "* * * it shall * * * be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

If there is a legal basis for the restriction of travel by the promulgation of 22 C.F.R. 53.3, which excludes Cuba from the list of countries to which a citizen may travel without a passport specifically endorsed for such travel, then the court concludes defendant is guilty of the offenses charged. Defendant argues there is no legal basis for the restriction on travel here involved and no legal basis for making a violation of the restriction a criminal offense. Defendant, by way of argument [pg. 3-10 of her Memo in support of motion for judgment of acquittal], urges that the regulation last above mentioned was not promulgated under 8 U.S.C. 1185(b), which makes violation a crime [1185(c)], but actually under Executive Order 7856 and 22 U.S.C. 221(a) and 5 U.S.C. 151(c) which makes no provision for violation thereof to be a crime. This position of defendant is not supported by the opinion of the District Court in *MacEwan vs. Dean Rusk,* [D.C.E.D. Pa. Civil Action No. 33038, decided March 30, 1964] wherein Judge Freedman states at pages 8 and 9 of his opinion:

> "The Secretary of State does not rely solely on inherent executive power. He claims statutory authority for the regulations he has promulgated. There are two Acts of Congress to which the Secretary points as the sources of his power. One is §215 of the Immigration and Nationality Act of 1952, 8 U.S.C. §1185. The other is the Passport Act of 1926, §1, 22 U.S.C. §211(a)."

Following this statement, the court, at pages 12-14, outlines the history and contents of the pertinent Presidential proclamations (beginning with President Truman's proclamation No. 2914 on December 16, 1950), regulations prescribed by the Secretary of State and amend-

ments thereto and Public Notice No. 179, referred to by defendant herein.

The MacEwan case, supra, involved an action by plaintiffs therein for declaratory judgment which would declare invalid regulations issued by the Secretary of State (22 C.F.R. 53.3) pursuant to which they were refused endorsement on their passports for travel to Cuba. Both sides moved for summary judgment. Plaintiffs' motion was denied and the defendants' motion granted. In *Zemel vs. Dean Rusk,* et al., [D.C. Conn. Civil Action No. 9549, decided February 20, 1964] Judge Clarie, of a three-judge court, writing the majority opinion, observes at page 9:

> "It is this Court's finding that Congress has granted adequate authority to the Executive Department to make these regulations, that their application in this instance does not violate due process and the statutes which authorize the regulations, 22 U.S.C.A. § 211(a) and 8 U.S.C.A. § 1185 are valid and constitutional."

and at page 12:

> "In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. §221(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185."

The Zemel case involved an action by plaintiff "* * * for a declaratory judgment and to enjoin the enforcement and execution of two acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) and § 215 of the Immigration and

Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. §1185, both of which the plaintiff claims are repugnant to the Constitution." Both plaintiff and defendants moved for summary judgment. Plaintiff's motion was denied and defendants' motion was granted. Two of the judges of the three-judge court sitting on the case filed opinions concurring in part and dissenting in part from the majority opinion of Judge Clarie. Judge Smith disagreed with the view that the area restrictions are authorized and Judge Blumenfeld, although agreeing with Judge Clarie that the area restrictions are a reasonable regulation of travel, did not think the plaintiff was entitled to a construction of 8 U.S.C. 1185 before it is raised in a criminal proceeding.

This court concludes, after considering all of the arguments and examination of documents submitted by the parties, that Title 22 C.F.R. 53.1-9 was promulgated under the authority of 8 U.S.C. 1185 and that the amending regulation (1961) was also promulgated under said section and Presidential Executive Order No. 3004 which was issued under that statute. In Executive Order No. 3004, President Truman clearly found as provided therein "* * * that the interests of the United States require the restrictions and prohibitions, * * *." Said Executive Order adopted and incorporated therein 22 C.F.R. 53.1-9 and authorized the Secretary of State to "revoke, modify or amend such regulations as he may find the interests of the United States to require." Such delegation of authority is authorized by 3 U.S.C. § 301 and 302. See also 8 U.S.C. 1185(b).

Defendant urges that the restrictions on travel here involved find no basis in the inherent power of the Executive, that the issue here turns on government control

over travel in relationship between this Government and its own citizens as distinguished from control as an instrument of foreign policy in the relations of this country with other countries. This point was considered by this court on defendant's motion to dismiss and the court adheres to its conclusion at that time, that the conduct of foreign affairs would include the authority to limit travel to certain areas of the world by citizens of the country without valid passports.

The other points made by defendant in support of her motion for acquittal are that:

(a) Congress, in enacting 8 U.S.C. 1185(b), did not authorize the Executive to impose the limitations here involved,

(b) Such construction of the statute delegates legislative power contrary to Article I, Section 8, of the Constitution of the United States, and

(c) Such construction deprives defendant of her right to travel contrary to the First and Fifth Amendments of the Constitution of the United States.

As to (a) above, the court is of the opinion that the provisions of Section 1185 are sufficient to impose the penalty therein provided for violation of the limitation of travel to Cuba as set forth above. New legislation is not believed to be required. See MacEwan, supra, page 12. Points (b) and (c) above were argued by defendant in her motion to dismiss and considered by the court in its Memorandum Opinion filed October 30, 1963, on denying the motion to dismiss and that opinion is hereby adopted and made a part hereof by reference. It is to be noted that following the motion to dismiss in the instant action, further proceedings were delayed pending the

rulings of the courts in the MacEwan and Zemel cases, supra. The opinions in those cases, which have not as yet been reported, discuss and rule on most of the points urged by defendant in the case at bar and this court cites those civil actions in support of its conclusions herein.

Defendant depends in substantial part, in support of her position in the instant case, on the opinion of the Supreme Court of the United States in *Kent vs. Dulles*, 357 U.S. 116 (1958). The Supreme Court in the Dulles case was concerned with the delegation to the Secretary of State of authority to withhold passports to citizens because of their beliefs and associations. In the opinion of this court, the Kent case is clearly to be distinguished from the situation in the case at bar, as pointed out and discussed in the court's opinion re denying defendant's motion to dismiss, mentioned hereinabove, and that discussion will not be repeated at this time. For additional discussion of Kent vs. Dulles, supra, see also the MacEwan case, supra, pages 3-6, 17-19 and 23, and the Zemel case, supra, at pages 19-22, and cases there cited.

In the recent case of *Worthy vs. United States*, 328 F. 2d 386 (1st Cir. Feb. 20, 1964), the court was concerned with criminal liability on the part of the appellant, Worthy, who had *entered* the United States without a valid passport after visiting Cuba. In reversing the District Court, which held that Worthy had unlawfully entered the United States without a passport in the circumstances, the Court of Appeals observed that an unlawful entry does not include an unlawful departure. At page 393 of its opinion, the court states:

"If the conviction of the appellant had been for a willful *departure* from the United States without

a valid passport we would be confronted with a less difficult problem. A citizen, at an airport or pier, without a passport, can refrain from a violation of the statute by remaining in the country. So doing, the citizen can continue to exercise all of the rights and privileges of citizenship and enjoy the protection afforded to him by constitutions and laws incident to his citizenship." (Emphasis added.)

Also:

"Since Congress has the power to declare a policy with respect to foreign affairs, and to impose reasonable restrictions on the right of the citizen to travel in foreign countries, it follows that it may punish violations of the statute. See Hyde v. Shine, 199 U.S. 62, 25 S. Ct. 760, 50 L. Ed. 90."

Defendant is so insistent that her departure from the United States with intent to go to Cuba (by way of Mexico City) without a valid passport for Cuba does not violate the statute and regulation involved, that further brief comment on the point appears to be in order. It appears obvious that the intent of Congress was to allow the President, through the Secretary of State, to preclude travel to excluded areas or countries in circumstances such as are here involved. In the opinion of the court, "departure from the United States for Cuba" is tantamount to leaving the United States with the intent to go to Cuba which, it is agreed, the defendant did, and without a valid passport. If the effect of the statute and regulation can be circumvented by a citizen going to another country and there obtaining authority to travel to the excluded country then the in-

tent of Congress would be entirely obviated and the statute and regulation nullified.

The court concludes, after consideration of the stipulation as to facts, the oral argument of counsel and the memoranda of points and authorities filed, that defendant's motion for acquittal should be and is hereby denied, and the court finds the defendant guilty as charged on each of the counts in the Indictment.

Dated: May 13, 1964.

E. Avery Crary
E. Avery Crary
United States District Judge

APPENDIX B.

Opinion Below.

United States Court of Appeals for the Ninth Circuit.

Helen Maxine Levi Travis, Appellant, vs. United States of America, Appellee. No. 19,628.

[Nov. 19, 1965]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Koelsch, Circuit Judges; and Powell, District Judge.

Per Curiam:

This appeal is from a judgment and conviction for violation of 8 U.S.C. §1185(b) and the regulations thereunder, Sections 53.1 through 53.9, Title 22, Code of Federal Regulations as amended. The indictment in two counts charged that on January 22, 1962, and August 18, 1962, the appellant knowingly and willfully departed the United States for Cuba without a valid passport for such travel. A jury trial was waived and appellant was tried by the court on an agreed Stipulation of Facts.

Appellant is an American citizen. At all times pertinent and material she did not bear a valid United States passport specifically endorsed for travel to Cuba. Appellant had knowledge of the provisions of 8 U.S.C. §1185(b) and 22 CFR 53.2 and 53.3. Appellant made two trips to Cuba from the United States, both via Mexico. She obtained permission of the Cuban government to enter Cuba after her arrival in Mexico. On both

occasions of her departure from the United States it was appellant's intention to travel to Cuba.

Zemel v. Rusk, 381 U.S. 1, was decided by the Supreme Court in May, 1965, after this case had been argued. It was a civil action brought to compel the Secretary of State to issue a valid passport for travel to Cuba. The plaintiff there sought to enjoin the enforcement of the same criminal statute and regulations under which appellant here was convicted. The area restrictions on the issuance and use of passports were held constitutional and an authorized delegation of authority to the President and Secretary of State. 381 U.S. pages 7 through 13. The court declined to pass on the request to enjoin the enforcement of 8 U.S.C. §1185(b). It stated:

> "* * * We hold that on either interpretation of the complaint, the court below was correct in refusing to reach the issue of criminal liability.
>
> "* * * For if we are to avoid rendering a series of advisory opinions, adjudication of the reach and constitutionality of §215(b) must await a concrete fact situation. * * *" Zemel v. Rusk, 381 U.S. 1, at 19, 20.

Appellant attacks the statute, 8 U.S.C. §1185[1] as not authorizing area restrictions, being void as vague and

---

[1] "(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall,

not being cited in the promulgation clause of the amendment to the regulations which is referred to as the "Excluding Cuba" regulation. (22 CFR 53.3).

Area restrictions have long been used and are recognized as valid. 381 U.S. pages 7 through 13. Section 1185 made it unlawful to depart for Cuba without a valid passport in violation of 22 CFR 53.1-53.9, as amended. A reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport. That appellant knew this is agreed in the stipulation. The "Excluding Cuba" regulation is an amendment and as originally promulgated, 22 CFR 53.1-53.9, made specific reference to 8 U.S.C. §1185. We consider the statute and regulations valid against appellant's attack. *United States v. Healy,* 376 U.S. 75, 82, N. 7; *Worthy v. Herter,* 270 F. 2d 905, 912 (D.C. Cir. 1959); *Porter v. Herter,* 278 F. 2d 280, 282 (D.C. Cir. 1960); *Worthy v. United States,* 328 F. 2d 386 (5 Cir. 1964).

---

until otherwise ordered by the President or the Congress, be unlawful—

* * *

"Citizens

(b) After such proclamation as is provided for in sub-section (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

"Penalties

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; * * *."

Appellant contends hers was not a departure for Cuba as she did not have that country's consent to enter Cuba when she left the United States. Possible fact situations, including the one here, are suggested in *Zemel v. Rusk*, 381 U.S. 1, 19. It is our opinion that appellant did depart from the United States for Cuba without a valid passport in violation of 8 U.S.C. §1185-(b). We adopt a portion of the opinion of the trial court:

> "In the opinion of the court, 'departure from the United States for Cuba' is tantamount to leaving the United States with the intent to go to Cuba, which, it is agreed, the defendant did, and without a valid passport. If the effect of the statute and regulation can be circumvented by a citizen going to another country and there obtaining authority to travel to the excluded country then the intent of Congress would be entirely obviated and the statute and regulation nullified." (T. 123)

We affirm.

APPENDIX C.

Section 1185 of Title 8 of the United States Code, enacted as Section 215 of the Immigration and Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, reads in material part as follows:

Travel Control of Citizens and Aliens During War or National Emergency—Restrictions and Prohibitions on Aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addiion to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * *

Citizens

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Penalties

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; * * *.

APPENDIX D.

The "Excluding Cuba" Regulation, January 16, 1961, Dept. Reg. No. 108.456, 26 Fed. Reg. 482 (amending 22 C. F. R. Sec. 53.3 which follows immediately as Appendix E), reads in full as follows:

Dept. Reg. 108.456.

PART 53 — TRAVEL CONTROL OF CITIZENS AND NATIONALS IN TIME OF WAR OR NATIONAL EMERGENCY

EXCEPTIONS TO REGULATIONS

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, dated March 31, 1938, issued under the authority of section 1 of the act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), and section 4 of the act of May 26, 1949 (63 Stat. 111; 5 U.S.C. 151c), I hereby amend paragraph (b) of 53.3, Exceptions to regulations in §53.2 of Title 22 of the Code of Federal Regulations to read as follows:

§53.3 Exceptions to Regulations in 53.2

* * *

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman

except as provided in paragraph (e) of this section; or

App. D. Section 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004 dated January 17, 1953, 18 F.R. 489)

The regulation contained in this order shall become effective upon publication in the FEDERAL REGISTER. The provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) relative to notice of proposed rule making and delayed effective date are inapplicable to this order because the provisions thereof involve foreign affairs functions of the United States.

Dated: January 16, 1961.

For the Secretary of State.

LOY W. HENDERSON
Deputy Under Secretary for
Administration.

(F.R. Doc. 61-506; Filed, Jan. 18, 1961; 8:54 a.m.)

* * * *

APPENDIX E.

The regulations appearing in Part 53 of Title 22 of the Code of Federal Regulations in their *unamended form* as they appeared *prior to January 16, 1961* (i.e. before promulgation of the "Excluding Cuba" Regulation reproduced in Appendix D above), read in material part as follows:

Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

§53.1 *Definition of the term "United States."* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in §53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in §53.3.

§53.3 *Exceptions to regulations in §53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

* * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; * * *.

* * *

APPENDIX F.

Public Notice 179, January 16, 1961, 26 Fed. Reg. 492, reads in full as follows:

DEPARTMENT OF STATE

[Public Notice 179]

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 C.F.R. 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specially endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,

Deputy Under Secretary for Administration

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APPENDIX G.

Press Release No. 24, January 16, 1961, 44 Dept. of State Bull. 178, reads in full as follows:

PRESS RELEASE No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

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APPENDIX H.

Presidential Proclamation, No. 3004, January 17, 1953, 67 Stat. C31, reads in material part as follows:

A Proclamation

WHEREAS section 215 of the Immigration and Nationality Act, enacted June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be im-

posed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of Title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority

under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hreof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of sections 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

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APPENDIX I.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, reads in material part as follows:

A Proclamation

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 963

HELEN MAXINE LEVI TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After waiving a trial by jury petitioner was convicted in the United States District Court for the Southern District of California, on stipulated facts (Appendix, pp. 7–11, *infra*), of having twice wilfully departed from the United States in 1962, destined for Cuba via Mexico, without bearing a passport valid for travel to Cuba, in violation of Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b). She was sentenced, on each of two counts, to suspended six-month terms of imprisonment and to pay a fine of $500 (R. 125). The court of appeals unanimously affirmed the conviction (Pet. App. B, pp. 1–4).

212-261—66

The principal issues in this case concern the construction and constitutionality of Section 215(b) of the Immigration and Nationality Act of 1952, which, as interpreted by the courts below, imposed criminal liability upon petitioner for her violation of the Secretary of State's restriction on travel to Cuba which was sustained by this Court in *Zemel* v. *Rusk*, 381 U.S. 1. Those issues were expressly reserved in the *Zemel* decision (381 U.S. at 18–20), and we agree that they present important questions of federal law. On the other hand, we are also of the view that the decision of the court of appeals was correct.

As was true of the governing statute in *Zemel*, neither the terms of Section 215(b) nor its legislative history "affirmatively indicate an intention" (381 U.S. at 8) to encompass violations of area restrictions, although "its language is surely broad enough" (*ibid.*) to bring such violations within its reach. The inclusion of Section 215(b) in the 1952 Act constituted a substantial reenactment of a provision which had become law in 1918 (40 Stat. 559). As this Court observed in *Zemel* (381 U.S. at 8–9), area restrictions were first imposed as early as 1915, so that the 1952 provision was passed with Congress' awareness of a more-than-35-year history of such restrictions. Regulations adopted in 1938 expressly authorized the Secretary of State to impose such restrictions (see 381 U.S. at 10), and a general order making passports invalid for designated countries was issued by the Secretary of State in May 1952—just one month

before the reenactment of the provision involved in this case. This history, we submit, provides more support for the inference that Congress contemplated area restrictions when it passed Section 215(b) in 1952 than was provided by the pre-1926 practice which this Court found to be sufficient in *Zemel* to warrant the conclusion that the 1926 Act conferred upon the Secretary of State the power to impose area restrictions. Since area restrictions were an immediate and contemporary problem in 1952, it is most unlikely that, as petitioner contends (Pet. 13–21), Congress was then concerned only with the problems of "border control."

Petitioner's constitutional arguments were, in our view, correctly rejected by the courts below. To the extent that petitioner's claims rest on the First and Fifth Amendments (Pet. 28–30) and on the assertion that the statute improperly delegated legislative functions (Pet. 27–28), they were rejected in *Zemel* v. *Rusk*, 381 U.S. 1. The contention that Section 215(b) fails to provide adequate warning for the imposition of criminal liability (Pet. 21–24) is also unsound. The statute makes it a crime to depart the United States without bearing "a valid passport," and petitioner clearly knew that she possessed no passport valid for travel to Cuba. Since she departed with the intention of traveling to Cuba, her departure was no different than if she had left with an expired or revoked passport.

Three subsidiary contentions made by petitioner do not, of themselves, warrant review by this Court; and they were correctly rejected by the courts below. The Secretary of State's failure to invoke Section 215(b) in issuing the particular regulation affecting travel to Cuba does not render that Section inapplicable (Pet. 25–27). The "excluding Cuba" regulation was an amendment to 22 C.F.R. 53.3(b) (Pet. App. D), which was originally promulgated with explicit reference to the predecessor of Section 215(b). It was not necessary that the later amendment expressly invoke the criminal sanctions underlying the entire regulation. Nor is there substance to the claim that the Presidential Proclamations of 1950 and 1953 were insufficient to sustain the imposition of area restrictions (Pet. 32–33). Presidential Proclamation No. 3004 (Pet. App. H) expressly incorporated the then-outstanding area restrictions in 22 C.F.R. 53.1–53.9 and recognized that a continuing national emergency existed which warranted such restrictions. The existence of a national emergency has since been reaffirmed by President Eisenhower in 1960 (Exec. Order No. 10896, 3 C.F.R. (1959–1963 Compilation) 425) and by President Kennedy in 1962 (Exec. Order No. 11037, 3 C.F.R. (1959–1963 Compilation) 621). Whether such an emergency exists because of an external threat is surely an executive decision based on political considerations. Petitioner's claim that the proclamations declaring an emergency should be disregarded by this Court is not merely contrary to

well-established principles regarding the separation of powers (see, *e.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160, 170), but it is answered by common knowledge regarding the present state of international affairs.

Petitioner's claim that her conduct is not within the statute because she left the United States before receiving permission from Cuban authorities to travel to Cuba and did not go directly to that country (Pet. 31–32) is without merit. The stipulated facts show that she departed for the purpose of traveling to Cuba and that she accomplished this purpose (pp. 8, 9–10, *infra*). Hence her departure, insofar as it was accomplished without "a valid passport," was, for all practical purposes, no different than if she had traveled directly to Cuba. As the district court observed, the exception which petitioner would read into Section 215(b) would render the area restriction practically inoperative because anyone desiring to travel to a restricted area could then do so if he first went to any country for which no passport is required or to a country for which his passport is valid (Pet. App. A, pp. 7–8). If, as we submit, Section 215(b) imposes criminal liability on those who wilfully violate area restrictions, it could not have been the intent of Congress to permit such facile evasion.

For the foregoing reasons, we believe that the judgment of the court of appeals was correct. While we recognize that the principal questions presented in this case are important and merit resolution by this Court, we also note that there is no conflict of

decisions.[1] We believe it would be appropriate, therefore, for the petition for a writ of certiorari to be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
KEVIN T. MARONEY,
ROBERT L. KEUCH,
Attorneys.

MARCH 1966.

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[1] See *Worthy* v. *United States*, 328 F. 2d 386 (C.A. 5); cf. *United States* v. *Healy*, 376 U.S. 75, 83, n. 7. See also *Worthy* v. *Herter*, 270 F. 2d 905 (C.A.D.C), certiorari denied, 361 U.S. 918; *Frank* v. *Herter*, 269 F. 2d 245 (C.A.D.C.), certiorari denied, 361 U.S. 918; *Porter* v. *Herter*, 278 F. 2d 280 (C.A.D.C.), certiorari denied, 361 U.S. 918.

APPENDIX

United States District Court

Southern District of California, Central Division

No. 32380-CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

HELEN MAXINE LEVI TRAVIS, DEFENDANT

STIPULATION OF FACTS

1. IT IS HEREBY STIPULATED by plaintiff, United States of America, by and through counsel, Francis C. Whelan, United States Attorney, and Thomas R. Sheridan, Assistant United States Attorney, for the Southern District of California, and Helen Maxine Levi Travis and her counsel, John T. McTernan and A. L. Wirin, that jury trial is waived (a written waiver of jury trial is also on file) and the Court may decide the case on the following stipulated facts and argument of counsel.

2. That at all times mentioned in both counts of the indictment No. 32380-CD the defendant, Helen Maxine Levi Travis, was and is a citizen of the United States of America, and her residence address was and is 6324 Primrose Avenue, Los Angeles, California.

3. That on January 21, 1962, defendant, Helen Maxine Levi Travis, at Los Angeles International Airport, Los Angeles, California, applied for and was

issued a United Mexican States tourist permit number 3677106 through Pan American Airways, allowing her to enter the Republic of Mexico within the next 45 days and remain therein 180 days from the date of entry as a "tourist."

4. That on January 22, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the United States of America by boarding flight number 901 of the Compania Mexicana De Aviacion at the Los Angeles Airport, Los Angeles, California, and was a tourist passenger on said flight to Mexico, D.F., and at the time of boarding said flight at Los Angeles, California, intended to seek permission from representatives of the Republic of Cuba in Mexico, D.F., to visit Cuba, and if such permission was granted, to travel from Mexico, D.F., to Cuba. At the time of departing from the United States as herein stated, defendant, Helen Maxine Levi Travis, did not have Cuba's permission to enter Cuba. On January 23, 1962, in Mexico, D.F., defendant, Helen Maxine Levi Travis, applied for permission to enter Cuba, and said permission was granted on January 26, 1962.

5. That on February 1, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the Central Airport, Mexico, D.F., by boarding flight number 311 of the Compania Mexicana De Aviacion, and was a tourist passenger on said flight to Havana, Cuba.

6. That prior to boarding said flight number 311 at Central Airport, Mexico, D.F., United Mexican States tourist permit number 3677106 was cancelled by an

official of the Department of Interior, United Mexican States, at Mexico, D.F.

7. That on August 18, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the United States of America, by automobile at San Ysidro, California, and entered the Republic of Mexico, at Tijuana, Baja California, and at the time she departed from the United States of America she intended to seek permission from representatives of the Republic of Cuba in Mexico, D.F., to visit Cuba, and if such permission was granted, to travel from Mexico, D.F., to Cuba. At the time of departing from the United States as herein stated, defendant, Helen Maxine Levi Travis, did not have Cuba's permission to enter Cuba. On August 23, 1962, in Mexico, D.F., defendant, Helen Maxine Levi Travis, applied for permission to enter Cuba, and said permission was granted on August 30, 1962.

8. That on August 18, 1962, defendant, Helen Maxine Levi Travis, applied for and was issued a United Mexican States "tourist" permit number 2997335 at the office of Migration, Department of the Interior, Tijuana, B.C., allowing her to enter the Republic of Mexico and remain there for 180 days from date of entry.

9. That on August 31, 1962, United Mexican States tourist permit number 2997335 was cancelled by an official of the Department of Interior, United Mexican States, at Mexico, D.F.

10. That on August 31, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the Central Airport, Mexico, D.F., by boarding

flight number 465 of the Compania Cubana De Aviacion and was a tourist passenger on said flight to Havana, Cuba.

11. At no time pertinent or material herein did defendant, Helen Maxine Levi Travis, bear a valid United States passport specifically endorsed for travel to the Republic of Cuba; she at all times pertinent and material herein knew the provisions of Section 1185(b) of Title 8, United States Code, and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations.

12. That the defendant, Helen Maxine Levi Travis, on each occasion of her travel to Havana, Cuba, did travel in and about the Republic of Cuba and observe therein the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health. In the course of said travel and observation the said defendant took a number of photographs and those photographs attached hereto (as Exs. 1A to 1M) are representative of those taken by her as aforesaid.

13. That after the return of the defendant, Helen Maxine Levi Travis, from the departures set out in paragraphs 3, 4, 5 and 6 and paragraphs 7, 8, 9 and 10 and to her home in Los Angeles, California, she appeared before various groups and gatherings of her fellow citizens and reported to them her observations and findings during her trips to Cuba as aforesaid, and showed her photographs taken there, including Exs. 1A to 1M. In addition, the said defendant wrote descriptions of her trips and her observations in Cuba which she disseminated by mail to friends and

acquaintances, and the copy of her letter dated February 28, 1962, attached hereto (as Ex. 2) is representative of the information she communicated to them.

Dated: This 2nd day of April, 1964.

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5 Wheaton, pp. 76, 95-96 51

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IN THE

Supreme Court of the United States

October Term, 1966
No. 67

HELEN MAXINE LEVI TRAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR THE PETITIONER.

Opinions Below.

The memorandum opinion of the District Court denying petitioner's motion to dismiss [R. 42-47] is reported at 241 F. Supp. 468. The memorandum opinion of the District Court finding petitioner guilty as charged [R. 94-100] is reported at 241 F. Supp. 472.

The opinion of the Court of Appeals below affirming petitioner's conviction [R. 109-112] is reported at 353 F. 2d 506.

Jurisdiction.

The judgment of the Court of Appeals was entered November 19, 1965. [R. 112.] A timely petition for rehearing was filed December 17, 1965, and was denied on January 4, 1966. [R. 113.] The petition for certiorari was filed January 28, 1966, and was granted April 18, 1966. [R. 113.] The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Statute, Regulations and Proclamations Involved.

The statutory provision involved herein is 8 U.S.C. Sec. 1185 (Sec. 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190) (hereinafter referred to as Section 1185), which appears herein in Appendix A. The regulation involved herein is State Department Regulation No. 108.456, 26 Fed. Reg. 482, 22 C.F.R. Sec. 53.3 (hereinafter referred to as the Excluding Cuba Regulation), which appears herein in Appendix B. (For convenience, 22 C.F.R. Secs. 53.1, 53.2 and 53.3 as existing prior to the Excluding Cuba Regulation also appear herein in Appendix C.) Public Notice 179 (26 Fed. Reg. 492) and Press Release No. 24 (44 Dept. St. Bull. 178), issued by the State Department concurrently with the Excluding Cuba Regulation, appear herein as Appendices D and E, respectively.

Presidential Proclamation No. 3004 (January 17, 1953, 67 Stat. C31), issued under Section 1185 and to give that statute effect, appears herein in Appendix F. Presidential Proclamation No. 2914 (December 16, 1950, 64 Stat. A454), referred to in Proclamation No. 3004 above, appears herein as Appendix G.

Questions Presented.

In *Kent v. Dulles,* 357 U.S. 116, this Court distinguished between the civil side of the passport power (dealing with the granting or withholding of the diplomatic, safe-passage protections of passports) and the criminal side dealing with prohibitions upon exit from the country. In *Zemel v. Rusk,* 381 U.S. 1, the Court upheld the power of the Secretary of State to withdraw the safe-passage protections of a passport from one travelling to Cuba, but expressly left open the ques-

tion as to the Secretary's power to criminally prohibit such travel under the exit-control sanctions of 8 U.S.C. Sec. 1185.

The instant case presents that reserved question.

More completely stated, the question presented is whether the Excluding Cuba Regulation (with accompanying Public Notice and Press Release), eliminating Cuba from the area for which passports are not required and requiring a special validation, allowable only in total discretion, for travel thereto, can support a *criminal* prosecution under 8 U.S.C. Sec. 1185 for a claimed violation thereunder, including under that fundamental question the following subordinate issues:

(1) Whether Section 1185 (as distinct from the *civil* Act of July 3, 1926, involved in *Zemel v. Rusk*) grants statutory authority, backed by *criminal* sanction, for an area restriction upon travel such as the purported Excluding Cuba Regulation at bar;

(2) Whether said Regulation, in light of prior legislative and administrative history and administrative declarations indicating area restrictions are civil only in nature, and not criminal, and in light further of the considerations stated in (3) below, can be enforced under Section 1185 as a criminal prohibition without violating the requirements of due process of law prohibiting vagueness, contradiction and misleading terms in the communication of a criminal command;

(3) Whether said Regulation can be enforced with *criminal* sanctions under Section 1185 although the said Regulation was *expressly* not promul-

gated under authority of Section 1185 but only under authority of the *civil* Act of July 3, 1926, which bears no criminal penalty for violation of regulations issued under its terms;

(4) Whether Section 1185, if construed to authorize issuance thereunder of criminal area travel prohibitions, unconstitutionally delegates legislative power without adequate or any standards;

(5) Whether Section 1185 and the Excluding Cuba Regulation, if construed to authorize a criminal restraint against travel to Cuba, including particularly restraint whereunder special validation for such travel is allowable only under unconfined, absolute administrative discretion, deprives petitioner of personal liberty and of freedom of speech, thought and association contrary to the First and Fifth Amendments;

(6) Whether Presidential Proclamations Nos. 3004 and 2914 possess presently continuing validity and effect sufficient to support imposing under Section 1185 of regulations criminally prohibiting travel to a described area or country;

(7) Whether Section 1185 and the Excluding Cuba Regulation can properly be applied to a departure not directly to Cuba but only to Mexico, with application to Cuba for permission to enter being made only *after*, not prior to, United States departure.

Statement of the Case.

Petitioner (hereafter referred to as the defendant) was convicted below on two counts for claimedly violating Section 1185, and the Excluding Cuba Regulation under it. The indictment charged that upon two occasions, on January 22, 1962 and on August 18, 1962, defendant "did . . . depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico. . . ." [R. 1-2.]

Section 1185 provides in core that after a Presidential proclamation of a "national emergency" (proclaimed in Presidential Proclamations Nos. 3004 and 2914[1]), and after a further presidential proclamation of necessity[2] (proclaimed in Proclamation No. 3004, *supra*), it shall be a crime for any citizen "to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport", "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe."

Prior to the Excluding Cuba Regulation it was provided in 22 C.F.R. Secs. 53.1 *et seq.*, issued under au-

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[1]Presidential Proclamation No. 3004, 67 Stat. C31, Appendix F *infra*, was proclaimed January 17, 1953. It recited the "national emergency" proclaimed in Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, Appendix G *infra*, and declared that emergency "still exists." It is disputed under Point VI that Proclamations Nos. 3004 and 2914 were still valid and effective at the time of defendant's acts of travel concerned herein in 1962.

[2]The requirement is that the President find and proclaim "that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States". Presidential Proclamation No. 3004 so found and proclaimed.

thority of Section 1185, that passports should be required of all citizens to enter or leave the United States except that no passport should be required for citizens "traveling between the United States and any country or territory in North, Central or South American or any island adjacent thereto . . ." (22 C.F.R. Sec. 53.3, Appendix C, *infra.*)

The Excluding Cuba Regulation (Regulation No. 108.456, January 16, 1961, 26 Fed. Reg. 482), and Public Notice 179, 26 Fed. Reg. 492, and Press Release No. 24, 44 Dept. St. Bull. 178, issued simultaneously therewith, purport collectively to at once remove Cuba from the area under 22 C.F.R. Sec. 53.3 within which citizens may travel without a passport, and simultaneously to declare passports invalid for Cuban travel without a special validation allowable only in total administrative discretion.

Specifically, Regulation No. 108.456 purported to amend 22 C.F.R. Sec. 53.3 to insert in the language there exempting from requirement of a passport travel to "any country . . . in North, Central or South America or in any island adjacent thereto" the phrase, "excluding Cuba", and thereby to require a passport for Cuban travel. Simultaneously Public Notice 179 declared all passports "invalid for travel to or in Cuba . . . unless specially endorsed for such travel under the authority of the Secretary of State", and Press Release No. 24 declared "exceptions" to the prohibition on Cuban travel would be granted by the Secretary only "to persons whose travel may be regarded as being in the best interests of the United States . . ."

None of these "Excluding Cuba" public acts and documents—Regulation No. 108.456, Public Notice 179

or Press Release No. 24—cited or referred to Section 1185 in any way as authorizing or promulgative authority. *To the contrary, both* Regulation No. 108.456 and Public Notice 179 *expressly* cited as their *sole* promulgative authority only the *civil* Act of July 3, 1926 (44 Stat. 887, 22 U.S.C. Sec. 211a), a statute imposing *no criminal penalty* for violation of regulations issued under its authority.

Thus the promulgative paragraph of Regulation No. 108.456, excerpted for clarity, recites expressly the authority of the Act of July 3, 1926, stating:

> "Pursuant to the authority vested in me by . . . the act of . . . July 3, 1926 . . ., I hereby amend paragraph (b) of [22 C.F.R. 53.3] as follows: . . ." (26 Fed. Reg. 482.)[8]

In similar manner, Public Notice 179 states simply:

> "Therefore pursuant to the authority . . . of . . . the Act . . . of July 3, 1926 . . ., all United States passports are hereby declared to be invalid for travel to or in Cuba . . ." (26 Fed. Reg. 492.)

As to the prosecution below there are no disputed facts. Defendant was tried by the court with a jury waived, upon an agreed "Stipulation of Facts." [R. 49-52.]

It recites that defendant at all material times was and is a citizen [R. 49, par. 2]; that at all material times she knew the provisions of Section 1185 and of 22 C.F.R. Secs. 53.2 and 53.3 [R. 51, par. 11]; that at all material times she did not possess a valid United States

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[8]The promulgative clause also referred to the Act of May 26, 1949, 63 Stat. 111, 5 U.S.C. Sec. 151c, the general rule-making statute affecting the Secretary of State.

passport specifically endorsed for travel to Cuba [R. 51, par. 11]; and that on January 22, 1962 and on August 18, 1962 defendant "intentionally left and departed from the United States" by plane on the first date and by automobile on the second date. [R. 50-51, pars. 4 and 7.]

The Stipulation recites that defendant did not in either instance depart directly for Cuba but rather for Mexico, intending in each instance to seek permission to travel to Cuba only after her arrival in Mexico. [*Id.*]

In each instance defendant entered Mexico upon a tourist permit issued by that country's government, and at the time of departing "intended to seek permission from representatives of the Republic of Cuba in Mexico, D.F., to visit Cuba." At the time of each departure from the United States she "did not have Cuba's permission to enter Cuba" and she obtained that permission only after arrival in Mexico. [R. 50-51, pars. 4 and 7.] On the first occasion that permission was obtained four days after arrival in Mexico City, and on the second, twelve days after such arrival. [*Id.*] After the requisite permission had been obtained for entry into Cuba, defendant traveled from Mexico City to Cuba by plane. [R. 50-51, pars. 5 and 9.]

After her arrival in Cuba on each of her said journeys thereto defendant travelled in and about Cuba observing "the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health" and in the course of such travels took a number of pictures of which Exhibits 1A to 1M are representative. [R. 51-52, par. 12.] Upon her return to the United States and to

her home in Los Angeles, California, defendant appeared before "various groups and gatherings of her fellow citizens" and reported to them her observations upon her travels in Cuba and showed her photographs, Exhibits 1A to 1M. In addition defendant wrote descriptions of her trips and her observances in Cuba which she disseminated by mail to friends and acquaintances, and the copy of her letter dated February 28, 1962, Exhibit 2, is representative of such materials. [R. 52, par. 13.] The Stipulation of Facts was duly filed and Exhibits 1A to 1M and 2 were duly admitted in evidence. [R. 53.]

By a written motion to dismiss the indictment [R. 3-4] and by an oral motion for judgment of acquittal [R. 53], each supported on leave by written briefs [R. 5-18 and 54-73], defendant challenged in the trial court the statute and the Regulation on their face and as applied, upon grounds substantially as expressed herein in the Statement of Questions Presented above. Both said motions were denied. [R. 42-47 and 94-100.] Defendant was adjudged guilty on both counts of the indictment and was sentenced on each count to a fine of $500 and to six months imprisonment, suspended on probation. [R. 102-103.]

On appeal the Court of Appeals below affirmed. [R. 109-112; 353 F. 2d 506.] The Court of Appeals disallowed defendant's contention that Section 1185 did not authorize area travel restrictions under its criminal sanctions, citing only *Zemel v. Rusk* (though that decision involved only the *civil*, safe passage aspect of such restrictions and expressly reserved the question of criminal authority under Section 1185), and observing only that, "Area restrictions have long been used and are recognized as valid." [R. 111; 353 F. 2d at p. 508.]

The Court of Appeals further rejected defendant's contention that the statute and Regulation denied due process for vagueness and contradiction in the communication of a criminal command, citing only the circumstance that the Stipulation of Facts recited defendant "knew" the contents of Section 1185 and the Excluding Cuba Regulation. The Court of Appeals misread this Stipulation as signifying defendant "knew" the *meaning* of the statute and Regulation as claimed and contended for by the Government. The true stipulation was only that defendant "knew the provisions of Section 1185(b) of Title 8, United States Code and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations." [R. 51, par. 11.] This does not at all stipulate to knowledge of the meaning or effect of the statute or Regulation as claimed by the Government.[3a]

The Court of Appeals further disallowed defendant's contention that her departure in the circumstances described in the Stipulation of Facts as heretofore summarized did not in any event constitute a departure *for* Cuba within the prohibition of the statute and Regulation, stating only that if the contrary be held "the intent of Congress would be entirely obviated and the statute and regulation nullified." [R. 112; 353 F. 2d at p. 508.] The Court below did not address itself to the remainder of the defendant's contentions.

Also before this Court, joined for argument with the instant case, is the related prosecution in *United States v. Laub* (E.D.N.Y., 1966) 253 F. Supp. 433, probable jurisdiction noted in 384 U.S. 984. There the defendants, who possessed passports but without special valida-

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[3a]The circumstance was pointed out in the Petition for Rehearing filed below.

tion for travel to Cuba and who were prosecuted as at bar under Section 1185, were acquitted by the trial judge who found Section 1185 inapplicable to lend criminal sanctions to area travel bans.

Summary of Argument.

We deal here with the exit control function of the passport power, not its diplomatic function as a request for the traveler's safe passage. This case presents the question reserved in *Zemel v. Rusk,* 381 U.S. 1, whether the exit control sanctions of 8 U.S.C. Sec. 1185 can be used to enforce area restrictions on travel.

(1) The terms and the legislative and administrative history of Section 1185, and of its two predecessor statutes, the Act of May 22, 1918 (40 Stat. 559) and the Act of June 21, 1941 (55 Stat. 252), of which it is an exact reenactment, combine to demonstrate that Section 1185 does not authorize issuance under its criminal sanctions of geographical travel restrictions upon a traveler's destination. The terms of the statutes do not suggest authority for such restrictions, and the legislative history of the 1918 and 1941 Acts makes it clear that those statutes were expressly intended as war-emergency *border-control* measures only, designed to prevent border crossings by spies and enemy agents. The purpose was to regulate travelers, not destinations. No different intent was expressed in the passage of Section 1185 as a reenactment of the prior statutes.

There has been a consistent pattern of administrative construction of the current and predecessor statutes as providing no criminal penalty for the enforcement of frequently imposed area restrictions. The geographic limitations imposed, beginning as early as 1919, were

cast in safe passage request terms only, without suggesting criminal consequences for noncompliance. In certain instances the existence of criminal sanctions to enforce the restrictions was specifically disclaimed, and the safe-passage nature of the limitation was emphasized. One of these was published in 1952 while the present Section 1185 was under consideration by the Congress. Another was presented to the Congress in 1957 as the carefully considered position of the Department of State. The President and the Department in 1958 specifically requested the enactment of sanctions to compel compliance with area restrictions. In the legislative studies that followed, the Chairman of the Senate Committee on Foreign Relations advised the Congress that the law was deficient in failing to provide such sanctions. The Congress failed to enact the legislation. Finally, the government has admitted that since the enactment of Section 1185 in 1952 there have been approximately 600 known violations of its area restrictions. But the first attempts to invoke criminal penalties have been confined to the restrictions on travel to Cuba: the instant case, initiated in 1963; *United States v. Laub,* instituted in 1964; and *Worthy v. United States* (C.A. 5, 1964), 328 F. 2d 386, involving an entry rather than a departure.

Consistent with the Department's long construction of area travel restrictions as noncriminal measures, the Excluding Cuba Regulation, issued January 16, 1961, and Public Notice 179 which accompanied and publicized the Regulation, were cast in the form of a civil, safe-passage measure only. Both the Regulation and the Public Notice cited as promulgative authority only the civil Act of July 3, 1926 (44 Stat. 887, 22 U.S.C. Sec.

211a), not Section 1185, and the Public Notice, reciting as the cause of the restriction "the absence of diplomatic relations" with Cuba, declared only that under the authority of the Act of July 3, 1926 "all United States passports are hereby declared to be invalid for travel to or in Cuba."

By its terms, and by legislative history and by years of consistent administrative construction, Section 1185, like its predecessors, is inapplicable to area restrictions and does not authorize the imposition of such restrictions under its criminal sanctions.

(2) Moreover, even if it be assumed Section 1185 could now be construed to lend criminal sanctions to area restrictions, in light of the ambiguity of the statute and the many explicit and implicit Departmental acts and statements indicating area restrictions are not enforceable under the statute, to uphold criminal liability at bar would violate due process requirements forbidding vagueness, contradiction and misleading terms in the communication of a criminal command.

The face of the statute discloses no purpose to authorize area restrictions. The legislative history of the statute and its exact predecessors shows an express intent to impose only border control over certain types of persons—to regulate travelers, not destinations. The administrative interpretation forms a consistent pattern of area restrictions in the form of refusals to request safe passage, and criminal prohibitions have not been mentioned. As of the time of the offense charged here, there had never been a prosecution under Section 1185 or its predecessors for violation of any of the area restrictions; nor had there been any declaration that any

of the earlier area restrictions were or could have been issued with criminal exit control sanctions under Section 1185 or its predecessors.

On the contrary there have been affirmative, authoritative administrative *disclaimers* of criminal sanctions. The Department of State itself in 1952 declared that area restrictions "in no way forbi[d]" free travel in violation of their terms but constitute merely "additional steps to warn American citizens of the risks of [unsanctioned] travel." Further in 1957 the Department advised the United States Senate upon official inquiry that travel to an area-restricted country "does not . . . [in itself] violat[e] the criminal law," although criminal laws may be violated in the *course* of such travel and the traveler must understand that he "cannot be assured of the protection of the United States."

All of these matters of record tell the citizen that travel to the disapproved areas is not regarded as a crime. To prosecute thereafter turns this contrived structure of administrative regulations into a trap even for the wary. To suffer criminal conviction in such premises "would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." (*Raley v. Ohio*, 360 U.S. 423, 426; *Cox v. Louisiana*, 379 U.S. 559, 571.)

Moreover, all of the foregoing circumstances are climaxed finally by the promulgation clause of the Excluding Cuba Regulation itself, and by Public Notice 179 which accompanied and publicized the Regulation, both of which cite as promulgative authority only the civil Act of July 3, 1926, not Section 1185. The Public Notice, reciting as the cause of the restriction "the ab-

sence of diplomatic relations" with Cuba, declares only that under the authority of the Act of July 3, 1926 "all United States passports are hereby declared to be invalid for travel to or in Cuba."

In all of these premises it appears difficult to deny that defendant, or any other citizen, might reasonably read the Excluding Cuba Regulation in the light of all of these circumstances as communicating no criminal-sanction area travel prohibition. Defendant did not reach the wrong interpretation of the regulatory maze. Rather the Government reversed its field by professing to impose no criminal sanction and after the defendant's travel doing the very opposite. Due process forbids contradictory, misleading or vague criminal commands. (*United States v. Cardiff*, 344 U.S. 174, 176-177.)

(3) Additionally, even if it be assumed that Section 1185 authorizes the issuance under its criminal sanctions of area travel prohibitions, violation of the Excluding Cuba Regulation can be no crime at bar because that Regulation was not *promulgated* under the sanctions of Section 1185 but was *expressly* promulgated *only* under the authority of the *civil* Act of July 3, 1926, *supra*, a statute imposing no criminal sanctions for violations of regulations issued under its terms.

The citizen cannot be held criminally liable for violation of a regulation issued under a statute which does not make such a violation a crime.

(4) Construed to authorize area travel restrictions, Section 1185 unconstitutionally delegates legislative power without adequate or any standards. *Zemel v. Rusk* dealt with delegation of legislative authority only as to the civil side of the passport powers; delegation

under a criminal statute, as at bar, must be more strictly judged. (*Fahey v. Mallonee,* 332 U.S. 245, 249-250.) Moreover, at bar there is no history of administrative construction to support criminal area restrictions such as existed in *Zemel* to support civil area restrictions. In *Zemel* such administrative construction was the base premise of the sustaining of the claimed power. Such premise cannot operate here. Without administrative aid, the statute must fail for improper delegation of legislative power, for there are *no* delegation standards whatever expressed in the statute's terms.

(5) Additionally, construed to authorize the Excluding Cuba Regulation at bar, Section 1185 deprives defendant of personal liberty and of freedom of speech, thought and association contrary to the First and Fifth Amendments. The liberty of travel is "basic in our values." It is "closely related to the rights of free speech and association" (*Aptheker v. Secretary of State,* 378 U.S. 500, 517), and in Chafee's words it "enables American citizens . . . to be well informed on public issues" and "contributes to sounder [democratic] decisions."

Defendant's travel to Cuba was in this tradition. She sought to visit Cuba to observe first hand the living conditions of the people and the social and economic program of the new government. On her return she reported to gatherings of fellow citizens what she had seen. Thus did she as one citizen attempt to participate in the nation's opinion-making processes.

We deal here with the criminal power to prohibit travel altogether, even as to citizens willing to travel without diplomatic passport protection. This court

should reaffirm that under the First and Fifth Amendments the Government may not prohibit and punish such free, innocent travel. Punishment so imposed is inconsistent with the protected liberties of a self-governing nation.

Moreover the restriction on travel at bar vests the Secretary with absolute, censorial power to allow travel to Cuba only when and where he deems such "in the best interests of the United States." Such arbitrary, censorial licensing power over travel particularly offends Constitutional fundamentals. (*Cox v. Louisiana*, 379 U.S. 536, 555-557; *Thornhill v. Alabama*, 310 U.S. 88, 97; *Kunz v. New York*, 340 U.S. 290, 294.)

(6) Even if Section 1185 be otherwise applicable to area travel restrictions there exist at bar no sufficient Presidential proclamations of need and emergency to satisfy the statute's explicit terms.

Firstly, there is no proclamation whatever of need for *geographical* travel restrictions, either generally or as to Cuba as a particular instance. Section 1185 is a criminal statute and must be narrowly construed, and its precondition that departure restrictions must be found to be "require[d]" by "the interests of the United States" must be liberally enforced in favor of the accused so as to require for area departure restrictions a finding of specific need for such particular restrictions, either individually or at least as a category.

Secondly, both Proclamations Nos. 2914 and 3004 (issued December 16, 1950 and January 17, 1953, respectively) are bottomed on the emergency of the Korean War existing at the time of their proclamation; that foundational premise of both proclamations ceased with

the end of that "war" emergency on July 27, 1953. (13 Encyc. Brit. 467, 474.) This Court is not controlled by an outdated executive proclamation of an emergency which by passage of time has ceased to exist. It has the authority to inquire as to whether there is in fact such a national emergency in existence today as can support the restriction upon liberty of travel represented by the Regulation at bar. (*Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-548; *Baker v. Carr*, 369 U.S. 186, 214.)

(7) In any event defendant's conduct did not violate Section 1185 properly construed and Constitutionally limited. Defendant departed not for Cuba but for Mexico, and only *after* her United States departure, and *after* her arrival in Mexico on the occasion of each of her trips, did she apply for and ultimately secure Cuban permission to enter Cuba. Accordingly, at the time of each of her "departures" from the United States she had no *ability* to, and she did not, "depart" from the United States "*for* the Republic of Cuba" within the meaning of Section 1185.

Section 1185 covers only *departure*; it operates only on the facts existing at the moment of such departure. To say that departure can be rendered penal by a *subsequent* seeking and obtaining of permission to enter Cuba is to defy reason and to make the statute arbitrary and void in its application under due process fundamentals.

ARGUMENT.

I.

Congress in Enacting Section 1185 Did Not Authorize the Issuance Thereunder of Criminal-Sanction Area Travel Bans.

In *Kent v. Dulles,* 357 U.S. 116, this Court distinguished (pp. 120-123, and 129) between the *two* separable functions of passports—the first as a *civil* diplomatic act of granting or withholding requests for safe passage, and the second as an instrument of *criminal* exit-control. *Zemel v. Rusk* dealt with the *civil* function of the passport for purposes of travel to Cuba and held as to that matter—the *civil* withholding of request for safe-passage—that the civil Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. Sec. 211a, granted the Secretary authority to impose area travel restrictions and thereunder to refuse to issue Cuban travel passports. However, this Court there *expressly* reserved the question "whether [a person] can be criminally prosecuted under . . . 8 U.S.C. Sec. 1185(b) . . . for travel in violation of an area restriction." (381 U.S. at p. 18.) That reserved question is now posed here. And the first issue presented under that question, before Constitutional issues or particular contentions are reached, is whether Congress in enacting Section 1185 *authorized* the imposition of criminal area travel prohibitions or restrictions. Examination will demonstrate that it did not.

(1) The legislative history of Section 1185, enacted June 27, 1952, demonstrates that it was no part of the purpose of Congress in enacting that Section to authorize the imposition thereunder of criminal area travel prohibitions.

Section 1185, like its two predecessor statutes of which it is in the respects here material an *exact* reenactment, is a departure-and-entry statute purposed at *border control.* In material terms it makes it criminal, when its provisions are in effect during emergency and by proclamation, for any citizen "to depart from or enter" the United States "unless he bears a valid passport" subject to such "exceptions as the President may . . . prescribe."

The Section derives originally from the Act of May 22, 1918, 40 Stat. 559 (hereafter cited simply as "the 1918 Act"), which as a World War I measure was expressly made operative only "when the United States is at war." That Act prohibited citizen entries and departures in exactly the same terms as quoted above under present Section 1185.

The 1918 Act expired in effect as to World War I by Congressional resolution on March 3, 1921. (41 Stat. 1359.) Thereafter, in 1941 Congress passed the Act of June 21, 1941, 55 Stat. 252 (hereafter cited as "the 1941 Act"), amending the 1918 Act to make its terms and provisions (which were left unchanged) effective either during war or during the then existing "national emergency" proclaimed by the President on May 27, 1941. The 1941 Act was continued in operative effect by Congressional joint resolutions (66 Stat. 54, 57; 96; 137; 330, 333) to and beyond June 27, 1952, on which date Congress enacted Section 1185. Section 1185 repealed the 1918 and 1941 Acts (66 Stat. 279) and simultaneously reenacted their substantive terms in unchanged form so far as here material (66 Stat. 190), thus continuing in effect and reenacting the restrictions upon citizen entries and departures exactly as ex-

pressed in the earlier Acts. Under Section 1185 these restrictions were made operative either during "war" or during "any national emergency proclaimed by the President."[4]

There is virtually no legislative history surrounding Congress' enactment of Section 1185 except the single, vitally important fact, as developed in detail under Section (2) hereafter, that in the very midst of Congressional consideration of the bill which included Section 1185 the Department of State issued its official public statement, May 1, 1952, announcing (despite the then full effectiveness of the 1918 and 1941 Acts) that its area passport restriction issued that day, invalidating passports for travel to East European countries, China and the Soviet Union, "in no way forbids" citizen travel to the affected areas.[5] This Department statement came just two months before the enactment of Section 1185 on June 27, 1952 and climaxed, as hereafter detailed, a history of administrative practice during the operative periods of the 1918 and 1941 Acts indicating those Acts were not conceived to impose criminal restraints upon area-restricted travel.

The only direct Congressional legislative history attending the enactment of Section 1185 is the simple statement in the House Report (H. Rep. 1365, 82nd Cong. 2d Sess., p. 53) that the provisions of the new

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[4]All three of these statutes in addition to being conditioned upon either the existence of war or of a proclamation of national emergency, required as well that the President first find and proclaim a necessity in "the interests of the United States" for "restrictions and prohibitions in additions to those provided otherwise than by this [Act] . . . upon the departure of persons from and their entry into the United States."

[5]Press Release No. 341, 26 Dept. St. Bull. 736, discussed *infra*, section (2).

act (Section 1185) "are incorporated in the bill in practically the same form as they now appear in the Act of May 22, 1918 [as continued in force by the Act of June 21, 1941]." Accordingly the true legislative history of Section 1185 is, in a substantive sense, the legislative history of its two *exact* predecessors, the 1918 and 1941 Acts. (*Kent v. Dulles,* 357 U.S. 116, 137, dissenting opinion; *United States v. Plesha,* 352 U.S. 202, 205.) The history of those Acts, as will be seen, demonstrates clearly that they were conceived and intended as entry and departure, border-control statutes only, designed primarily to prevent entries or departures by spies, couriers or citizen foreign agents, and were not intended to impose or to authorize under their criminal sanctions geographical area travel prohibitions restricting the travel of persons lawfully qualified to travel generally. They were meant to regulate *travelers* not to censor *destinations.*

(a) Thus, firstly, the legislative history of the original parent act, the Act of May 22, 1918, abundantly demonstrates that Congress' object and concern in creating that Act was to deny exit and entry to any persons engaged during the then existing war in activities in the interest of Germany and her allies. The purpose was to close the borders to all entries or exits not scrutinized through the requirement of a passport, and by such scrutiny to exclude spies, saboteurs and agents of the enemy.

President Wilson, in calling upon Congress for the 1918 legislation said it was required because the exigencies of the war made it "necessary . . . to create a very definite and particular control over the entrance and departure of all persons into and from the United

States." (56 Cong. Rec. 18, 20.) The House Report upon the measure observed that existing law "leaves American citizens and neutrals perfectly free to come and go" across United States borders even though engaging in espionage or related activities, or suspected thereof, and concluded, "New legislation is the only remedy." (H. Rep. No. 485, "Control Of Travel From and Into The United States", 65th Cong. 2d Sess., pp. 2-3)

In the Senate debates the spokesman for the bill said it was "supplementary to the espionage laws" and that its "chief object" was to scrutinize and deny border passage to "aliens and alien enemies and renegade citizens" engaging in or subserving espionage who "can now enter and depart without any power . . . [in the Government] to intercept or delay them." (56 Cong. Rec. 6192.) In the House debates the House spokesman said the bill was "a much-needed measure to stop a gap" in the law; he said its "purpose is to give . . . the Government power to control ingress to and egress from the country", power then lacking "even [as to] people suspected of not being loyal . . . [or] in the employ of enemy governments." (56 Cong. Rec. 6029.)

Time and again in the debates on the 1918 Act the purpose is reiterated to impose *border control*, to scrutinize all travelers in order to identify and deny exit or entrance to spies, agents and couriers and persons who have violated or are fleeing from the law.[6] *Nowhere* in the debates is there even a suggestion of any purpose to either authorize or impose any regulation of the *destinations* of citizens innocent of any such character-

[6]56 Cong. Rec. 5970, 6029-6031, 6066-6067, 6191-6192, 6194-6195 and 6248.

istics.[7] Within the contemplation of Congress' plain and evident purpose a citizen once qualifying generally for a passport, and thus for exit, might travel freely wherever he might please.

(b) The legislative history of the 1941 Act, the Act of June 21, 1941, is in all respects similar. The House spokesman for the 1941 bill, in the House debates, declared the bill's "sole purpose" was to create "a sort of clearing house" over persons entering and leaving the country to ascertain "their reasons why they were going or coming . . . and whether they were engaged in espionage, and whether their coming in or going out would be inimical to the interests of the United States." (87 Cong. Rec. 5052.) There was no purpose to interfere with the free and full right to travel of anyone qualifying for and entitled to the issuance of a passport. Thus a statement by a Department spokesman, read to the House, affirmed that the bill's concern was with "persons . . . engaged in espionage and subversive activities . . . [or] in activities inimical to the best interests of the United States", and declared, "It is not contemplated, should the proposed legislation be enacted into law, *to restrict or to prohibit or in any way to impede the legitimate travel of citizens* . . ." (87 Cong. Rec. 5048, emphasis added.) This precise language was subsequently embraced in the concluding paragraph of the report of the Senate committee reporting on the bill, and was specifically incorporated in the record of the Senate debate. (87 Cong. Rec. 5326; Sen. Rep. No. 444, 77th Cong. 1st Sess.)

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[7] 56 Cong. Rec. 5969-5971, 6029-6032, 6061-6068, 6191-6195, 6235. 6246-6248; H. Rep. No. 485, 65th Cong. 2d Sess., *supra*; Sen. Rep. No. 431, 65th Cong. 2d Sess.

Moreover again, as in the case of the 1918 Act, the debate attending the consideration and passage of the 1941 Act bespeaks repeatedly a Congressional purpose to close the borders to spies and persons deemed dangerous to United States interests.[8] Again nowhere in such debates in their entirety is there any suggestion of purpose to impose or to authorize the issuance of regulations imposing area travel restrictions.[9]

(2) Moreover, the limiting import of the foregoing legislative history is corroborated by the form and casting of the area restrictions undertaken by the Secretary of State during the operative periods of the current and predecessor statutes. There is a consistent history beginning under the predecessor statutes, continuing through the period of Congressional consideration of the present Section 1185 in 1952, and extending long after 1952, of area restrictions cast in civil terms only. Frequently the Department specifically explained its geographical limitations as carrying no criminal sanctions for noncompliance.

(a) Prior to the enactment of Section 1185 on June 27, 1952 the Secretary of State proclaimed area travel restrictions upon five occasions within the periods of the operative effect of the 1918 and 1941 Acts (1918-1921 and 1941-1952).[10] These were:

1. Restriction in 1919 as to Germany (3 Hackworth, Digest of International Law, 530);

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[8]87 Cong. Rec. 5325-5326, 5386, 5048-5053, 5386-5388.

[9]87 Cong. Rec. 5047-5053, 5325-5326, 5385-5389.

[10]The 1918 Act was in effect by Presidential Proclamation only between August 8, 1918 and March 3, 1921. (40 Stat. 1829 and 41, Stat. 1359.) The 1941 Act was in effect by successive Presidential proclamations and Congressional extensions from

(This footnote is continued on the next page)

2. Restriction in 1950 as to Bulgaria and Hungary (22 Dept. St. Bull. 399);
3. Restriction in 1951 as to Czechoslovakia (24 Dept. St. Bull. 932);
4. Restriction in 1951 as to Hungary (26 Dept. St. Bull. 7);
5. Restriction in 1952 as to East European countries, China and the Soviet Union (26 Dept. St. Bull. 736).

Without exception all of these area restrictions issued during the operative periods of the 1918 and 1941 Acts were cast in civil, safe passage terms only, without suggestion of relevance to the 1918 or 1941 Acts or to criminality.

Moreover, in two of the restrictions the civil-only, non-prohibitory nature of the restrictions was made particularly clear and explicit.

Thus, for example, in the 1919 restriction as to travel to Germany, the Department's announcement indicated plainly that despite the restriction citizen travel to Germany without a passport was *not* prohibited but was merely placed at a traveler's own risk. In its announcement the Department declared that it was "not now issuing or authorizing issuance . . . of passports for Germany" but that it "interposes no objection" to travel there without a passport by any person with "important . . . business", though "such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protec-

November 1941 (55 Stat. 1696) to April 1, 1953 (66 Stat. 54, 57, 96, 137, 330, 333) by which date Section 1185 was already in effect by Presidential Proclamation 3004, January 17, 1953 (67 Stat. C31).

tion which they might expect under normal conditions."[11]

The clearest statement of the non-penal, non-prohibitory character of the Department's area restrictions appears in the 1952 restriction of travel to East European countries, China and the Soviet Union. As heretofore noted that Department declaration, issued May 1, 1952, came immediately prior to the enactment by Congress, June 27, 1952, of Section 1185, and in the very midst of Congressional consideration of that measure. In the May 1, 1952 announcement the Department advised the public it was "stamping all passports not valid for travel" in the specified countries "unless specifically endorsed . . . for such travel." However, declared the official press release, "In making this announcement the Department *emphasized* that this procedure *in no way forbids* American travel to those areas", but amounts merely to a "taking [of] additional steps to warn American citizens of the risks of travel in . . . [such] countries."[12]

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[11]The full text of the restriction reads: "The Department is not now issuing or authorizing issuance or amendment of passports for Germany. However, the Department interposes no objection to the entry into Germany of Americans who have important and urgent business to transact there. In view of the present situation, such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions." (3 Hackworth, *supra*, p. 530.)

[12]The full text of the Department's announcement (Press Release No. 341, 26 Dept. St. Bull. 736) reads as follows:

"The Department of State announced today that it was taking additional steps to warn American citizens of the risk of travel in Iron Curtain countries by stamping all passports not valid for travel in those countries unless specifically endorsed by the Department of State for such travel.

"In making this announcement, the Department emphasized that this procedure in no way forbids American travel to

(This footnote is continued on the next page)

The 1952 reenactment of statutory language having this history of interpretation and application may be fairly said to carry an explicit purpose not to impose penalties to enforce area restrictions on travel. The Constitutional stature of the right of exit as delineated in *Kent v. Dulles, supra,* would require a specific and articulated intent to impose such restrictions before the inferences drawn from this history could be properly ignored.

(b) The Department's interpretation and application of the predecessor language in the 1918 and 1941 Acts has continued and even been underscored since enactment of Section 1185 to and until the very recent present.

Since the enactment of Section 1185 the Department has announced area travel restrictions upon four occasions. These are:

1. Restriction in 1955 to Albania, Bulgaria, China, North Korea and North Viet Nam (33 Dept. St. Bull. 777);
2. Restriction in 1956 as to Hungary (34 Dept. St. Bull. 247-248);
3. Restriction in 1956 as to Egypt, Israel, Jordan and Syria (35 Dept. St. Bull. 756, 21 Fed. Reg. 8577);

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those areas. It contemplates that American citizens will consult the Department or the Consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

"All new passports will be stamped as follows: 'This passport is not valid for travel to Albania, Bulgaria, China, Czechoslovakia, Hungary, Poland, Roumania or the Union of Soviet Socialist Republics unless specifically endorsed under authority of the Department of State as being valid for such travel.'"

4. Restriction in 1961 as to Cuba, involved at bar (26 Fed. Reg. 482 and 492).

Again, despite the full operative effect at all times of Section 1185 these proclamations unvaryingly have sounded in diplomatic, safe-passage terms only; none was said to have been issued under or be given criminal exit-control sanction by Section 1185.

Thus, for example, the 1956 restriction as to travel to Hungary stated merely that the Department "is unwilling" "either to encourage or facilitate the travel of American citizens to Hungary", and that passports would not be valid for travel thereto unless specially validated. No mention of Section 1185 or of its sanctions is made, despite its full operative effectiveness at the time. (34 Dept. St. Bull. 247, 248.)

Moreover, in two of the area restrictions here concerned, the one concerning Israel, Egypt, Jordan and Syria in 1956 and the restriction concerning Cuba in 1961 involved at bar, the Department expressly recited its promulgative authority only under the non-criminal power of the Act of July 3, 1926 (22 U.S.C. Sec. 211a), *not* under the criminal authority of Section 1185. (21 Fed. Reg. 8577 and 26 Fed. Reg. 482 and 492.)

Additionally, in 1954 the Department by conduct expressly construed the area restriction against travel to Bulgaria and Hungary announced in 1950 as being non-penal and non-prohibitory. The Department in 1954 informed two newsmen desiring to enter Bulgaria that they might travel there without a passport and "use, as a travel document . . . an affidavit in lieu of a passport", and if Bulgaria would permit them entry "the

Department . . . [holds] no objection." (Hearings on Department of State Passport Policy before the Senate Committee on Foreign Relations, 85th Cong., 1st Sess., April 2, 1957, p. 65; hereafter cited as "1957 Senate Hearings".)

(c) Furthermore, it is of particular note and importance that on two occasions the State Department has in express words *conceded* and *declared* that area travel restrictions are civil-passport regulations only, and are not prohibitory in a penal sense. The first occasion is the one already mentioned of the 1952 area restriction as to East European countries, China and the Soviet Union wherein the Department declared it wished to "emphasiz[e]" that its restriction "in no way forbids" travel by American citizens to the affected countries. The Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, which in 1958 completed a survey of passport and travel laws under a grant from the Fund for the Republic, noted this 1952 statement of the Department, and observed, "This appears to have been an honest admission of the lack of statutory power to enforce an area restriction of this nature."[13]

A second and critically important declaration by the Department that its area travel restrictions do not criminally prohibit travel to any affected countries under Section 1185 or otherwise, came in an official Departmental communication to the Senate Foreign Relations Committee in 1957. There the Committee called

[13]Report, "Freedom to Travel" (1958) issued by the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, page 70; hereinafter cited as "Report, 'Freedom to Travel' ".

the Department's attention specifically to its 1952 declaration referred to above that its area restrictions "in no way forbi[d]" affected travel, and asked the Department squarely, "What does it mean when a passport is stamped 'not valid to go to country X'?" Does such procedure, the Committee asked, mean merely that the United States "withdraws its protection" from and "does not approve" such travel, *or* does it mean the United States "prohibits the person from going to country X?" (1957 Senate Hearings, *supra*, p. 56.)

After two months of study, the Department officially replied by a communication to the Committee, July 5, 1957, that a restrictive stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be violating the criminal law.*" (*Id.* at p. 59, emphasis added.) The Department said there were criminal laws "which might well be violated *in the course* of such travel", mentioning "e.g. The Trading With The Enemy Act," and, additionally, such travel might lead to the denial of a future passport and might raise questions as to whether "false statements" had been made in obtaining the passport in question. But the mere travel to the area-restricted country *in se* would be *no crime*. No mention or citation was made of Section 1185 as even relevant to the issues posed, despite the thorough canvass of the law.

Surely had the Department in thus communicating its considered views to the Senate committee truly conceived that Section 1185 applied to make criminal a mere leaving of the United States to go to "country X", it would have said so. In the premises its statement, with

its limiting connotations, is eloquent testimony that in truth the Department viewed its area restrictions under law as civil, safe-passage procedures only, not as criminal-sanction measures of exit control.

Moreover, the Department's view of area restrictions as civil measures only is further corroborated by the failure of the Department until the instant case and two recent related cases ever to prosecute any person under Section 1185 or either of its predecessor statutes for violation of any of the Department's many area restrictions established during the operative periods of those statutes. Thus, as related in *United States v. Laub, supra,* 253 F. Supp. 433, 443-444, although Department statistics show that "approximately 600" persons have violated area travel restrictions since the enactment of Section 1185 alone, the Department concedes that the instant prosecution and the prosecutions in *United States v. Laub,* in 1964, and in *Worthy v. United States* (C.A. 5, 1964), 328 F. 2d 386, represent the first attempts by the Department ever to prosecute persons under Section 1185 for claimed violations of area travel restrictions.

(d) Finally, that neither Section 1185 nor any other criminal law applies to give penal effect to area passport restrictions is confirmed by many recent calls upon Congress for legislation to amend Section 1185, or other laws, to provide such very effect, and by Congress' repeated refusal to enact any of such proposals.

Thus in 1957 the report to Congress of the United States Commission on Government Security, established by Public Law 304, 84th Congress, 1st Session (69 Stat. 595) to survey among other areas of law the area of travel and passport legislation, specifically rec-

ommended that, "Title 8, U.S.C.A., section 1185(b), should be amended to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid." (Report, p. 475.)

In like vein in 1958 the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York published its Report heretofore described. At page 70 of such Report the Committee pointedly stated its conclusion of the need for area travel criminal legislation. Said the Committee:

> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case."

On July 7, 1958, responsive to the Report of the Commission on Government Security above described and to this Court's restrictive decision in *Kent v. Dulles, supra,* President Eisenhower recommended to Congress passage of legislation to provide, among other things, for "clear statutory authority to prevent Americans from using passports to travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States." (104 Cong. Rec. 13062.)

The legislation called for by the President was embodied in bills introduced in 1958 in the 85th Congress, 2d Session, introduced in the Senate as S. 4110, and in

the House as H. R. 13318. Congressman Kenneth B. Keating, in introducing H. R. 13318, declared to the Congress:

> "It . . . specifically authorizes the Secretary of State to designate as out-of-bounds to American passport holders certain areas of the world. Persons who violate the law would be guilty of a misdemeanor and liable to imprisonment for 1 year, or a fine of $1000, or both." (104 Cong. Rec. 13000.)

Neither S. 4110 or H. R. 13318 was enacted into law. They died with the end of the 85th Congress. Congressional failure to act in these respects is not without significance for the issue here. This was failure to act in response to a formal message submitted by the President which particularly requested the imposition of criminal sanctions to enforce area restrictions. This failure came against a background of expressions of Congressional purpose to utilize Section 1185 for ends other than to authorize area restrictions, as well as a consistent pattern of administrative utilization of only the civil function (and not the exit control function) of passports in implementing area restrictions. In these lights, Congress' failure to act suggests a declination to provide the Executive with sanctions it admitted were lacking and without which it had so long prescribed area travel restrictions.[14]

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[14]Moreover, over 30 bills to accomplish, *inter alia*, the same objectives were introduced in the 86th and succeeding Congresses. That the Congress was aware of the lack in existing law of sanctions to enforce area restrictions criminally appears from the remarks of Senator J. William Fulbright, Chairman of the Senate Committee in charge of the legislation. It will be recalled that it was Senator Fulbright's Committee which in 1957 had posed the question of whether travel to "country X" in violation of a Departmental travel restriction would *per se* constitute a crime.

(e) All of the foregoing legislative and administrative history, it is submitted, combines to establish four decisive things as to Section 1185. First, the history shows that Section 1185 was adopted by Congress on representations that it was to serve limited (border control) purposes only and without suggestion of authorization for criminal-sanction area restrictions. Second, the history shows that the Department, in prescribing area restrictions, has uniformly cast them only in terms of the civil passport function of safe passage, and has consistently construed Section 1185 and its predecessors as inapplicable and irrelevant thereto. Third, the history reveals two express declarations by the Depart-

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Senator Fulbright's understanding of the lack of criminal sanctions appears from his description of the relevant portions of his bill (S. 2287, 86th Cong., 1st Sess.):

> "Section 402 makes it unlawful for any citizen . . . voluntarily to travel to any country or area as to which there is in effect, to his knowledge, a declaration made and published by the President under Section 401(b). There is at present no statutory authority to punish travel abroad by passport holders in violation of general geographic restrictions, and this presents a glaring gap in enforcement of our security policies." (Hearings before the Senate Committee on Foreign Relations on Passport Legislation, July 13, 1959, 86th Cong., 1st Sess., p. 18.)

The other bills referred to above include bills providing on pain of criminal punishment that "no citizen shall travel to any country or area" designated as area-restricted by the President such as: H.R. 9069 (86-1) (meaning. 86th Cong., 1st Sess.); S. 2095 (86-1); S. 2287 (86-1); S. 2652 (86-2); H.R. 973 (87-1); H.R. 1086 (87-1); H.R. 2485 (87-1). Bills expressly to amend Section 1185(b) to make criminal "travel to any country in which his passport is declared to be invalid" include: S. 4030 (85-2); H.R. 376 (86-1); H.R. 2232 (86-1); H.R. 2468 (86-1); H.R. 7315 (86-1); S. 1303 (86-1); H.R. 388 (87-1); H.R. 935 (87-1); H.R. 958 (88-1). Bills providing the "travel of all citizens may be [criminally] restrained" with respect to area-restricted countries include: H.R. 5455 (86-1); H.R. 8329 (86-1); H.R. 4077 (87-1); H.R. 2559 (88-1); H.R. 2596 (89-1). Special bills having a like general prohibitory effect as all of the foregoing include: H.R. 5320 (88-1); H.R. 11621 (86-2); H.R. 8293 (89-1).

ment—one to the people and one directly to an agency of the Congress—officially advising that area restrictions do not "forbid" free travel and are not criminal in character. Finally, the history is climaxed and completed by requests of the Congress by the President and the Department that the Congress enact new legislation to make violations of area restrictions criminally punishable—requests which Congress has in all cases declined. All of this establishes a *compelling* record of administrative construction, with congressional acquiescence, that Section 1185 does not authorize issuance under its authority of criminal-sanction administrative area travel prohibitions.

II.

To Enforce the "Excluding Cuba" Regulation Under Section 1185 With Criminal Sanctions in the Premises at Bar Would Violate Due Process for Vagueness, Contradiction and Misleading Terms in the Communication of a Criminal Command.

In light of the many explicit and implicit indications by the Government prior to the instant prosecution that its area travel restrictions represented merely civil, safe-passage measures only, not criminal prohibitions, as related above, and in light of the further circumstance (treated hereafter in detail under Point III *infra*) that the Excluding Cuba Regulation at bar was expressly promulgated not under Section 1185, with criminal sanctions, but only under the Act of July 3, 1926, 22 U.S.C. Sec. 211a, a statute bearing no criminal sanctions, to sustain the conviction below would violate "fundamental fairness" and basic due process requirements forbidding vagueness and misleading and con-

tradictory terms in the communication of a criminal command.

Consider the position of a citizen confronted with the Excluding Cuba Regulation. It, together with Public Notice 179 and Press Relase No. 24, purports to require a passport for travel to Cuba and to simultaneously provide that *all* passports shall be "invalid for Cuban travel "unless specially endorsed"—a condition to be satisfied only in the absolute discretion of the Department. Moreover it expressly declares it is promulgated "under the authority of the . . . act of July 3, 1926," a statute providing no criminal punishment for violation of its terms or of regulations issued under it, not under Section 1185.

Is the Regulation a criminal command or a mere civil, safe-passage measure?

The Regulation itself being unclear, and reciting *only* civil authority for its promulgation, the citizen turns to the general law. He examines there Section 1185. He finds that that statute, as heretofore related, by its terms carries no suggestion of authority for *area prohibitions* upon travel destinations. The terms plainly import that a passport may be either required, or not required, for entries and departures, as regulations may provide, and even that passports may be denied to travelers deemed disqualified for cause, but there is no suggestion from the provisions of the statute that departures *for particular countries* as destinations may be *prohibited* by both requiring and simultaneously denying to all persons a passport therefor.

The citizen next turns to legislative and administrative history. He finds there, as heretofore related, that both under Section 1185 and its two predecessor acts,

the 1918 and 1941 Acts, area passport restrictions appear always to have been formulated and cast as civil, safe-passage procedures only, not as criminal travel prohibitions. Never in the expression of such passport restrictions has the Department even referred to either Section 1185 or its predecessor acts. Instead the citizen finds the Department, as in the German travel restriction in 1919, advising the citizen merely that travel to a restricted area is "upon [a traveler's] own responsibility and at [his] own risk," and further declaring, as in the 1952 restriction, that area restrictions "in no way forbi[d]" affected travel but amount merely to "steps to warn . . . citizens of the risks" thereof. Additionally and to like effect he finds the Department in 1957 formally advising a Senate Committee, inquiring upon the very issue, that if a person travels to an area-restricted country the consequence is "that . . . he cannot be assured of the protection of the United States", but that, as to mere innocent travel *in se* to such destination the travel "does not . . . mean . . . [the traveller] will be violating the criminal law," though if he otherwise transgresses in the *course* of such travel there may be criminal laws he might violate, "e.g., Trading with the Enemy Act."

The significance of the foregoing in terms of due process is that all of these matters of record—addressed to the public by official departmental spokesmen—advise the citizen in substance and in core that area passport travel restrictions are not criminal prohibitions but are civil, safe passage measures only, and that if a person is willing to travel "upon [his] own responsibility and at [his] own risk" his otherwise lawful travel to any affected area will violate no criminal law.

In such premises, now to reverse the Government's position and sustain a conviction as below for a claimed criminal violation of Section 1185 would be, in this Court's words, "to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a [right] which the State clearly had told him was available to him." (*Raley v. Ohio*, 360 U.S. 423, 438; *Cox v. Louisiana*, 379 U.S. 559, 571; *Stevens v. Marks*, 383 U.S. 234, 245.)

The requirement of due process and of "fundamental fairness" (*Scull v. Virginia*, 359 U.S. 344, 353; *Johnson v. United States*, 318 U.S. 189, 197; *Watkins v. United States*, 354 U.S. 178, 214) is that an accused may not be held to answer "for a crime he could not with reasonable certainty know he was committing" (*Scull v. Virginia, supra*). A criminal enactment must be so expressed as to give "fair warning" of what is meant to be prohibited (*Bouie v. City of Columbia*, 378 U.S. 347, 355; *United States v. Cardiff*, 344 U.S. 174, 176; *Raley v. Ohio, supra*, 360 U.S. 423, 438; *Stevens v. Marks, supra*, 383 U.S. 234, 245); citizens must not "be misled" but must be "clearly apprised" of what the law condemns. (*Johnson v. United States, supra*, 318 U.S. 189, 197; *Quinn v. United States*, 349 U.S. 155, 166.) In consequence, criminal commands communicated to citizens in conflicting or contradictory terms, or with misleading effect, necessarily offend due process. (*United States v. Cardiff, supra*, 344 U.S. 174, 176-177; *Scull v. Virginia, supra*, 359 U.S. 344, 353; *Raley v. Ohio, supra*, 360 U.S. 423, 438; *Stevens v. Marks, supra*, 383 U.S. 234, 245; *cf. Johnson v. United States, supra*, 318 U.S. 189, 196-197; *Jones v. United States*, 362 U.S. 257, 263-264.)

It matters not that at bar the command was expressed in part merely by a "regulation". Regulations, in this Court's words, in "practical effect" amount to "little laws" (*United States v. Mersky*, 361 U.S. 431, 437), and when joined with criminal statutes to give criminal penalty must be judged under "the same strict rule of construction" and the same due process prohibitions against vagueness and ambiguity as apply to criminal statutes proper. (*Kraus & Bros. v. United States*, 327 U.S. 614, 621-622; *United States v. Mersky, supra*, 361 U.S. 431, 437.)

Applicable here is the decision in *United States v. Mersky, supra*. There a treasury regulation was ambiguous whether its provisions were intended to implement one or the other of two statutes. If the regulation was meant to implement the first statute, dealing with customs collections, there would be no criminal violation posed by the conduct there in issue, but if the regulation related to the second statute, dealing with frauds upon the public as to the origin of imported goods, there would be posed a criminal violation. This Court declared there that the regulation must be construed under "the rule of strict construction" and that a reading of the regulation "leaves the distinct impression" that it was meant only to implement the customs collection statute, not the statute as to public frauds. Affirming a dismissal of the criminal charge, this Court observed, "If the intent were [to implement the second, not the first statute] it should not have been left to implication. There must be more to support criminal sanctions: [citizens] must not be left to guess the meaning of regulations." (361 U.S. at p. 441.)

In *Kraus & Bros. v. United States, supra,* 327 U.S. 614, the issue was whether a certain regulation issued under the Emergency Price Control Act of World War II prohibited *per se* all "tied-sales" (sales requiring the purchase of a second commodity as a condition for purchasing a price-controlled commodity) in the sale and purchase of poultry, or only tied-sales requiring the purchase of worthless second commodities. The regulation was clear as to coverage of sales within the second, narrower category, but was ambiguous as to blanket coverage of all tied-sales *per se.* Observing that the power of an administrative officer to promulgate regulations bearing criminal sanctions "creates a grave responsibility" whereunder "in a very literal sense the liberties . . . of others may depend upon his definitions and specifications", the Court at page 621 declared that regulations must be made "explicit and unambiguous" to support criminal penalties, and ruled the regulation there inadequate to penalize tied-sales not involving valueless second commodities. The Court said that regulations to support criminal enforcement "must adequately inform those who are subject to their terms what conduct will be considered . . . to bring the penalties . . . into operation", and the "dividing line . . . cannot be left to conjecture." The prohibition intended by the regulation must be "so clearly expressed . . . that the ordinary person can know in advance how to avoid an unlawful course of action." (327 U.S. at pp. 621-622.)

At bar the Cuban travel regulation, read with the public notice and press release issued simultaneously therewith, and read in the light of the legislative and administrative history reviewed above, was at best con-

tradictory and conflicting as to its civil versus penal nature and character, and at worst affirmatively misleading. In either case the conviction cannot Constitutionally stand.

United States v. Cardiff, supra, 344 U.S. 174, demonstrates the Constitution's requirement and command. There a factory inspection statute appeared contradictorily both to require consent to authorize an inspection and to make nonconsent criminally punishable. The Court voided a prosecution thereunder for nonconsent, stating at page 176 that the statute gave no due process "fair warning" because "it gives conflicting commands. It makes inspection dependent on consent and makes refusal to allow inspection a crime." The Court concluded, "We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold." (pp. 176-177.)

Even if it be assumed there were at bar some indica at some points of criminal prohibition, at least there is involved, in the words of the *Cardiff* decision, the giving of "conflicting commands." The State is making penal conduct it has many times in the past explicitly and implicitly indicated was only civilly disapproved. Thus the State is punishing in the defendant what the State's prior declarations "on [their] face apparently gave [a citizen] the right to [do]." (344 U.S. at p. 177.)

Also closely in point on the score here concerned is this Court's decision in *Raley v. Ohio, supra,* 360 U.S. 423. There a state investigating commission in effect assured certain witnesses appearing before it that they had available a privilege against self-incrimination and

might rightfully refuse to answer questions. Thereafter, after the witnesses had so refused to answer, the state prosecuted them for criminal contempt, claiming that an applicable state statute gave the witnesses automatic immunity, eliminating in law the privilege to refuse to answer. Upon review this Court voided the convictions there obtained, stating, "After the Commission, speaking for the State, acted as it did", to sustain the contempt judgments would be to sanction "convict-[ion] of a citizen for exercising a privilege which the State had clearly told him was available to him." (pp. 425-426.) To like essential effect and accord are the decisions in *Stevens v. Marks, supra,* 383 U.S. 234, 244-246; *Cox v. Louisiana, supra,* 379 U.S. 559, 571; and *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 79-80.

It can hardly be denied that the defendant acted plausibly and reasonably at bar in reading the Department's Cuban area passport restrictions as bearing no criminal-prohibition sanctions under Section 1185. A like reading of area restrictions and Section 1185 was made by the Special Committee of the Association of the Bar of the City of New York in interpreting the Department's 1952 statement that area restrictions "in no way forbi[d]" affected travel as "an honest admission of the lack of statutory power to enforce an area restriction." The Committee, after long study of all of the travel and passport laws, reported it had "not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission . . ." (Report, "Freedom to Travel", *supra,* p. 70.)

Moreover, in premises parallel to those at bar a District Court judge has but recently read Section 1185 as not making penal travel contravening the Cuban area restriction. In the New York case joined herewith for argument, *United States v. Lamb,* the District judge refused to hold a departure for Cuba (after travel to Paris and Czechoslovakia) without a specially validated passport a violation of Section 1185, declaring "there is a gap in the law" failing to make such conduct penal. (*United States v. Laub, supra,* 253 F. Supp. 433, 460.) In *United States v. Mersky, supra,* as to the ambiguous regulations there which, as at bar, could be read as either penal or nonpenal in the premises concerned, this Court in voiding the conviction noted, "A United States district judge concurred in [the defendants'] reading of the regulation. In the framework of criminal prosecution unclarity alone is enough to resolve the doubts in favor of the defendants." (361 U.S. at p. 441.)

At bar, thus, even after long trial and appellate analysis and briefing it remains *at least* uncertain and debatable whether area passport travel restrictions are criminal and prohibitory in nature or are merely civil, safe passage measures. As this Court stated in *Watkins v. United States, supra,* 354 U.S. 178 at p. 214, "if [a] point is that obscure after trial and appeal," with full legal analysis, then "certainly" it "was not adequately revealed" to the defendant as a layman-citizen at the time before prosecution when she had to read the law and determine its penal or permissive character to determine her conduct. "Fundamental fairness" demands that no citizen "be compelled to make such a determination with so little guidance." [*Id.*] Government "may not substitute" for fair criminal

notice "an intricate scheme" of regulations, statutes, Public Notices, press releases and administrative and legislative history "and thereafter hold in [criminal violation] those who fail fully to perceive its subtleties." (*Stevens v. Marks, supra,* 383 U.S. 234, 246.)

Moreover, even if the defendant at bar "guessed" wrongly as to the nonprohibitory, noncriminal nature of area restrictions, there is lacking at bar the indispensable element of *criminal scienter.* Section 1185 punishes only one who violates its terms "willfully". (Subsection (c).) In both a statutory and a Constitutional sense before a citizen may be validly prosecuted under such Section he must be made to *know* by Government that his act is *criminally prohibited* and not merely civilly disapproved; without such awareness his state of mind lacks the "willfulness" required for criminal prosecution. (*Quinn v. United States, supra,* 349 U.S. 155, 165-167, 170; *Flaxer v. United States, supra,* 358 U.S. 147, 151, 152; *United States v. Murdock,* 290 U.S. 389; *Morissette v. United States,* 342 U.S. 246; *Lambert v. California,* 355 U.S. 225; *Smith v. California,* 361 U.S. 147; *Heikkinen v. United States,* 355 U.S. 273, 279-280.)

Particularly pertinent here on the score of scienter are the *Quinn* and *Flaxer* case, *supra.* In both of those cases witnesses before a Congressional investigating committee raised objections to questions and invoked claims of privileges not to answer, and the committee in each instance failed to make clear whether the objections were accepted, and the committee merely displeased, or whether the objections were rejected and the witnesses criminally *required* to answer. This Court held the offense of contempt "requires a criminal intent

— . . . a deliberate, intentional refusal to answer", and a witness could not in criminal terms be required to "guess" whether his refusal to answer was merely displeasing or whether answer was required as a criminal command. (349 U.S. at pp. 165 and 170; 358 U.S. at p. 151.)

So, too, at bar. Consistent with the requirement of punishable "wilfulness", the defendant at bar could not be required to "guess" whether the Cuban area travel restriction represented only civil governmental disapproval and the withdrawal of the diplomatic sponsorship of safe passage, or constituted a penal prohibition. So long as the crucial distinction between mere displeasure and a criminal command remained an "ambiguity" and was not resolved by Government "with a reasonable degree of certainty" (*Flaxer v. United States, supra,* 358 U.S. at p. 151) the defendant's conduct below could not be "wilful" and punishable in terms of fundamental law.

III.

The "Excluding Cuba" Regulation Was Not Validily Promulgated Under Section 1185.

Even if it be assumed that Section 1185 authorizes the issuance under its criminal sanctions of area travel prohibitions, violation of the Excluding Cuba Regulation can be no crime at bar because that Regulation was not *promulgated* under that criminal authorizing statute, but was *expressly* promulgated *only* under the authority of the Act of July 3, 1926, 22 U.S.C. Sec. 211a, a statute bearing no criminal sanctions for violations of regulations issued under its terms.

The penalty-imposing, criminal-warning portions of Section 1185 (Subsection (c)) provide for punishment only of persons who "wilfully violate any of the provisions" of Section 1185 itself "or . . . of any . . . regulation issued *thereunder*." (Emphasis added.) Section 1185 and the only regulations validly issued *thereunder* (Departmental Order No. 1003, 6 Fed. Reg. 6069, as amended by Departmental Regulation 11, 10 Fed. Reg. 11046,[15] being 22 C.F.R. Sec. 53.1 *et seq.* in the form pre-existing the Excluding Cuba Regulation) do *not* require a passport for travel to Cuba and do *not* purport to impose any area travel prohibition as to Cuba or any other country or area.

It is only the Excluding Cuba Regulation, and Public Notice 179 and Press Release No. 24 issued simultaneously with it, which collectively purport to at once both require passports for travel to Cuba and simultaneously to provide passports shall be invalid for such travel unless specially validated therefor in the discretion of the Secretary of State. But that Regulation, and its accompanying Public Notice and Press Release, were *expressly* issued under the authority *only* of the *civil* Act of July 3, 1926, not under Section 1185.

Thus the promulgative clause of the Excluding Cuba Regulation is clear and specific. The official text of the Regulation (Regulation No. 108.456) appears in Vol-

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[15]Both promulgated, as hereafter noted, *expressly* under the authority of the 1918 and 1941 Acts predecessor to Section 1185, and incorporated under Section 1185 *expressly* by Presidential Proclamation No. 3004, 67 Stat. C31.

ume 26 of the Federal Register at pages 482-483. The promulgating clause (excerpted for emphasis) reads *specifically:*

> "Pursuant to the authority vested in me . . . under the authority of . . . the act of . . . July 3, 1926, . . . I hereby amend paragraph (b) [of 22 C.F.R. 53.3] as follows. . . ."[16]

The criminal-sanction authority of Section 1185 is *not* invoked. The *civil* Act of July 3, 1926 merely grants the Secretary civil discretion to "grant and issue" passports and does not purport to provide criminal punishment for violation of any regulation issued under its terms.

Thus the Excluding Cuba Regulation *upon its face* and *by its very terms* is promulgated not under the criminal-penalty authority of Section 1185[17] but only under the authority of the Act of July 3, 1926, a civil act providing no criminal sanctions for violation of regulations issued under its authority.

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[16]The promulgative clause also invokes the authority of the Act of May 26, 1949, 63 Stat. 111, 5 U.S.C. Sec. 151c, the general rule-making statute affecting the Secretary of State; that Act is likewise a civil statute providing no criminal punishment for violations of regulations issued under it, and being more general than the Act of July 3, 1926, adds nothing thereto for the purposes here concerned.

[17]It is true that inserted (in parenthesis) between paragraphs of the Regulation as printed in the Federal Register there is a reference to Section 1185 which is clearly not a part of the promulgative clause or of the text of the Regulation itself. This indication of awareness of Section 1185 while not including it in the promulgative clause, seems to manifest a conscious intent not to invoke it as promulgative authority. Additionally, as the Regulation appeared in the Code of Federal Regulations pocket supplement at the time of the adoption of the Regulation, the promulgative clause, in accordance with usual policy, was omitted while the parenthetical reference to Section 1185 was kept. The editorial work of the C.F.R. codifiers can neither add to or subtract from the legal authority of the Regulation as already issued.

Moreover that the Excluding Cuba Regulation was promulgated only under the civil Act of July 3, 1926 is confirmed and heightened by the circumstance that Public Notice 179 (26 Fed. Reg. 492), issued simultaneously with the Regulation and for the very purpose of communicating the same to the public, repeats the promulgative language of the Regulation and again invokes *only* the civil promulgative authority of the Act of July 3, 1926, making no reference whatever to Section 1185 or any other penal promulgative authority, or to any possible penal sanctions. Public Notice 179 (excerpted for emphasis) merely recites:

> "Therefore, pursuant to the authority of . . . the Act . . . of July 3, 1926 . . . all United States passports are hereby declared to be invalid for travel to or in Cuba . . ." (26 Fed. Reg. 492.)

Additionally, that the Excluding Cuba Regulation was issued only under the civil sanctions of the Act of July 3, 1926, and not under the criminal sanctions or authority of Section 1185, is underlined and made even more plain by a comparison of its promulgative clause with the promulgative clauses of the original regulations under Section 1185 (constituting 22 C.F.R. Secs. 53.1 *et seq.* in the form pre-existing the Excluding Cuba Regulation). The original regulation issued under the 1941 Act as Departmental Order No. 1003, November 28, 1941, 6 Fed. Reg. 6069, exempted citizens from requirement of a passport as to travel to Canada, Mexico and "the islands of the West Indies" and certain other islands, but required passports for all other travel. This regulation was promulgated *expressly* "under authority of the act of . . . May 22, 1918 . . . as amended by the act of . . . June 21, 1941." (6 Fed. Reg.

6069.) This regulation was amended August 29, 1945, by Departmental Regulation 11, 10 Fed. Reg. 11046, to extend the exemption of citizens from requirement of a passport as to travel to "any country or territory in North, Central or South America, or in any island adjacent thereto." *Again* the amended regulation was promulgated *expressly* "under authority . . . of the act of . . . May 22, 1918 . . . as amended by the act of . . . June 21, 1941." (10 Fed. Reg. 11046.)

Moreover, when the above described original regulations, issued thus expressly under the 1918 and 1941 Acts, were adopted under Section 1185 after its enactment in 1952 by the President on January 17, 1953, in Proclamation No. 3004, 67 Stat. C31, the President in declaring the said prior regulation should be adopted as regulations under Section 1185 *expressly* recited that he was "acting under . . . the authority vested in me by section 215 of the Immigration and Nationality Act [*i.e.*, Section 1185]." (67 Stat. C31, C32.)

Thus the contrast is *complete*. The original regulations, on each occasion of enactment, were carefully promulgated under the criminal-sanction authority of the 1918 and 1941 Acts predecessor to Section 1185, and on the enactment of Section 1185 the said regulations were specifically adopted as regulations under Section 1185 by a presidential proclamation carefully reciting the criminal authority of Section 1185. The Excluding Cuba Regulation was not similarly issued but was issued and promulgated expressly only under the civil sections and authority of the Act of July 3, 1926.

In consequence a violation of the Excluding Cuba Regulation can be no crime. Section 1185(c) makes criminal only a violation of its own terms or of "any

. . . regulation issued *thereunder.*" The Excluding Cuba Regulation *by its terms* was *not* "issued *thereunder*" but only "under the authority of . . . the act of . . . July 3, 1926." Hence there is no conjunction of statute and regulation to create any criminal command, or to express any declaration or fair warning thereof.

It is basic in Federal criminal law that criminal commands must be strictly construed and must be confined to only that which is clearly expressed. (*United States v. Weitzel,* 246 U.S. 533, 543; *McBoyle v. United States,* 283 U.S. 25, 27; *United States v. Resnick,* 299 U.S. 207, 210; *Todd v. United States,* 158 U.S. 278, 282; *United States v. Harris,* 177 U.S. 305, 309.) And this rule applies as well to criminal regulations as to criminal statutes proper. (*United States v. Mersky,* 361 U.S. 431, 440; *Kraus & Bros. v. United States,* 327 U.S. 614, 622.) This Court has said in *United States v. Mersky* (*supra,* p. 440), "In the context of criminal prosecution, we must apply the rule of strict construction when interpreting [a criminal] regulation and statute. *United States v. Halseth,* 342 U.S. 277, 280 (1952); *United States v. Wiltberger,* 5 Wheat, 76, 95-96 (1820)."

A regulation has no force or operation as "law" except as it may be granted such force by an authorizing statute. (*Williamson v. United States,* 207 U.S. 425, 453 *et seq.; United States v. Standard Brewery,* 251 U.S. 210, 220; *United States v. United Verde Copper Co.,* 196 U.S. 207, 215-216.) And, "Much more does this principle apply to a case where it is sought . . . to prescribe a criminal offense by the regulation of a department. . . . It is necessary that a sufficient statutory authority should exist for declaring any act or omission

a criminal offense . . ." (*United States v. Eaton,* 144 U.S. 677, 687-688.) There are, in Federal criminal law, "no common law offenses" (*United States v. Eaton, supra,* at p. 687), and no "constructive offenses." (*Todd v. United States, supra,* 158 U.S. 278, 282; *United States v. Resnick, supra,* 299 U.S. 207, 210.) Criminality can exist "only for . . . an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress" (*Viereck v. United States,* 318 U.S. 236, 241), and "[w]here the charge [as to a regulation] is of crime, it must have clear legislative basis." (*United States v. George,* 228 U.S. 14, 22.)

The Excluding Cuba Regulation at bar does not evidence, in fact it *negates,* any "clear legislative basis" for a claim of "crime". It recites *expressly* civil promulgation *only.* Yet, in this Court's words, when a regulation is contended by Government to express or define a crime, "Congress has warned the public to look to that source alone [i.e., to the regulation] to discover what conduct . . . [will] create criminal liability." (*Kraus & Bros. v. United States, supra,* 327 U.S. 614, 622.) The fact that a regulation and a statute have been united to create a criminal offense may not be "left to implication" (*United States v. Mersky, supra,* 361 U.S. 431, 441) or to "conjecture". (*Kraus & Bros. v. United States, supra,* 327 U.S. 614, 621.)

The issue involved is a question of *authorizing power* and of *fair warning.* The authority of administrative officers to enact regulations with the force of criminal sanctions must be grounded in an *authorizing statute;* it is an awesome power, involving "grave responsibility" (*Kraus & Bros. v. United States, supra,* 327 U.S. 614,

621), and is strictly circumscribed. Accordingly, even to amend originally criminal regulations so that the amendment or change will also bear criminal force, the amendment must itself be duly issued under the authorization and authority of a statute providing criminal penalty for violation of regulations issued under it. The Act of July 3, 1926, under the authority of which *alone* the Excluding Cuba Regulation was expressly issued, possesses and transmits no such authorizing power. Hence violation of that regulation can be no crime.

Moreover, by reciting *civil* authority only in its express declaration of its promulgative base, the Excluding Cuba Regulation denies fair warning and, indeed, is affirmatively misleading to the public to whom it was addressed as to any claim now by the Government of criminal promulgative authority under Section 1185. A criminal statute warns by its terms of criminal penalty; the Excluding Cuba Regulation does not warn but affirmatively misleads. At bar a citizen could surely read the promulgative clauses of the Excluding Cuba Regulation and of Public Notice 179, issued to publish and communicate the Regulation, and reasonably infer from the express invoking of the authority of the Act of July 3, 1926 and the *absence* of any reference to any authority deriving from Section 1185, that the Regulation was not issued under sanction of Section 1185 and hence that violation would not and could not be chargeable as a crime under said Section. To retroactively announce otherwise, and with criminal penalty, denies all principles of fair warning and notice. Applicable here, therefore, are all of the authorities discussed under Point II above prohibiting ambiguity, contradiction and misleading terms in the communication of a criminal command.

Both for *actual* failure, then, of promulgation under the criminal-sanctions authority of Section 1185, and for failure to make such authority and promulgation reasonably *appear*, the Excluding Cuba Regulation at bar cannot be enforced as a crime.

IV.

Construed to Authorize the "Excluding Cuba" Regulation at Bar, Section 1185 Unconstitutionally Delegates Legislative Power Without Adequate or Any Standards.

If Section 1185 be construed to grant authority to impose under its criminal-exit sanctions area travel prohibitions such as the Excluding Cuba Regulation at bar it then offends the Constitutional fundamental prohibiting delegation of legislative power without reasonable and sufficient standards.

Article I, Section 1 of the Constitution vests in Congress "All legislative powers herein granted" and under this *exclusive* grant it "is a principle universally recognized as vital to the integrity and maintenance of [our] system of government" (*Field v. Clark*, 143 U.S. 649, 692) that Congress may not "abdicate, or . . . transfer to others, the essential legislative functions with which it is thus vested." (*Panama Refining Co. v. Ryan*, 293 U.S. 388, 421; *Schechter Corp. v. United States*, 295 U.S. 495, 529.)

Zemel v. Rusk, supra, 381 U.S. 1, upheld area travel restrictions against the charge of invalid delegation of legislative power only so far as the *civil* side of the law affecting passports is concerned, judging such restrictions only as diplomatic, safe-passage measures authorized under the Act of July 3, 1926, 22 U.S.C. Sec.

211a, a *civil-authorization* statute without criminal sanctions. At bar if area restrictions are to be sustained as authorized by Section 1185, with criminal enforcement sanctions, the authority delegated must be judged as a matter of delegated *criminal* powers. As this Court has noted, the two landmark delegation decisions, *Panama Refining Co. v. Ryan, supra,* and *Schechter Corp. v. United States, supra,* were "both . . . cases deal[ing] with delegation of . . . powers to make federal crimes of acts that never had been such before", and "a discretion to make regulations to guide [civil] action" may well be "constitutionally permissible" where in the same premises "it might not be allowable to authorize creation of new crimes in unchartered fields." (*Fahey v. Mallonee,* 332 U.S. 245, 249-250.) The point is "the power of punishment is vested [exclusively] in the legislative . . . department" of Government. "It is the legislature . . . [alone] which is to define a crime, and ordain its punishment." This is the "found[ation]" of the rule of strict construction of all criminal laws. (*United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 93.) Accordingly, *Zemel* does not control here.

Moreover, *Zemel* upheld the area travel restriction on Cuban travel under the civil Act of July 3, 1926 upon the sole basis of a premise not operative here. The foundational premise of *Zemel* was that while the Act of July 3, 1926 expressed no delegation standard within its terms, there existed a "consistent" history of prior administrative practice sustaining civil area restrictions under prior statutes of which the 1926 Act was a reenactment, and hence Congress for civil purposes might be deemed to have adopted such prior practice as a sufficient standard for the discretion delegated

under the 1926 Act. The Court ruled expressly that "the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.' . . . So limited, the Act does not constitute an invalid delegation." (381 U.S. at pp. 17-18.)

Even could such an informal premise of adoption of prior administrative practice operate to afford sufficient legislative standards for a *criminal* statute, the premise in any event has no application in fact to the delegation of administrative powers under Section 1185 at bar. As heretofore seen the administrative practice as to the issuance of area restrictions under the operative periods of the 1918 and 1941 criminal Acts of which Section 1185 is a reenactment so far from showing a "consistent", or any, practice of issuance of area restrictions thereunder, demonstrates affirmatively a clear administrative practice *to the contrary.* As heretofore seen, all area restrictions issued during the period of the criminal 1918 and 1941 Acts were unvaryingly formulated and cast as civil, safe passage measures only, without reference or conceived relevance to the criminal sanctions of the 1918 and 1941 Acts, and were cast in the Department's words to "in no way forbi[d]" affected travel.

Thus the prior administrative practice preceding the reenactment by Section 1185 of *its* predecessor statutes, the 1918 and 1941 *criminal* Acts, proves not the prior reasonable exertion of criminal area-restriction powers but a *denial* and *disclaimer* thereof. Such a *negating* record clearly can afford no administrative base for supplying affirmative discretionary standards capable

of adoption by Congress in the enactment of Section 1185.

As this Court emphasized in *Kent v. Dulles, supra,* 357 U.S. 116, 129, "control over exit" requires an exercise of "the law-making functions of the Congress" and affects "activities or enjoyment, natural and often necessary to the well-being of an American citizen", and in consequence this Court "will construe narrowly all delegated powers" affecting exit. Section 1185 affects the right of exit *directly,* as the Act of July 3, 1926 involved in *Zemel* did *not,* and Section 1185 operates by *criminal command.* Hence the scrutiny of the standards for delegated legislative powers under Section 1185 must be judged with "the tenderness of the law for the rights of individuals" required as to either the exercise or delegation of criminal powers. (*United States v. Wiltberger, supra,* 18 U.S. 76, 93; *Fahey v. Mallonee, supra,* 332 U.S. 245, 249-250.)

The fundamental requirement of the Constitution as to delegation of legislative powers, and particularly criminal legislative powers, is that Congress "itself" must erect "the standards of legal obligation". (*Schechter Corp. v. United States, supra,* 295 U.S. 495, 530.) Congress must provide "an intelligible principle" to guide administrative regulations (*Hampton & Co. v. United States,* 276 U.S. 394, 409; *Panama Refining Co. v. Ryan, supra,* 293 U.S. 388, 430), and must "legislate . . . as far as [is] reasonably practicable." (*Buttfield v. Stranahan,* 192 U.S. 470, 496.)

It cannot be suggested that these minimal requirements have been satisfied at bar. Section 1185 creates *no* standard and *no* "intelligible principle" to guide administrative regulations issuable under its terms. It sim-

ply authorizes "such limitations and exceptions" to its terms "as the President may authorize and prescribe", and thus leaves the executive branch without standards whatever. *No* standards cannot by definition be sufficient or adequate standards. And it cannot be said Congress has legislated "as far as [is] reasonably practicable" for if area restrictions were conceived desired at least a basic declaration affirming this and fixing minimum policy guides therefor could readily have been expressed.

V.

Construed to Authorize the "Excluding Cuba" Regulation at Bar, Section 1185 Deprives Defendant of Personal Liberty and of Freedom of Speech, Thought and Association, Contrary to the First and Fifth Amendments.

The liberty of individual citizens to travel freely to all parts of our world is, in this Court's words in *Kent v. Dulles,* "basic in our scheme of values"; it is "a part of our heritage." (357 U.S. at p. 126.) It is a right which "was emerging at least as early as the Magna Carta" (*id.,* at p. 125; Article 42, Magna Carta) and it was recognized by Blackstone. (1 Blackstone Commentaries, 134-135.) It is "deeply engrained in our history" and "may be necessary for a livelihood . . . [or] as close to the heart of the individual as the choice of what he eats, or wears, or reads." (357 U.S. at p. 126.)

Liberty of travel, moreover, is a freedom "closely related to rights of free speech and association." (*Aptheker v. Secretary of State,* 378 U.S. 500, 517.) The Universal Declaration of Human Rights relates it to the need of the people "to seek, receive and impart information and ideas . . . regardless of frontiers." (Articles

19 and 13(2).) Liberty of speech protects "freedom of inquiry" and "includes . . . the right to receive" information and ideas as well as to express such (*Griswold v. Connecticut,* 381 U.S. 479, 482; *Lamont v. Postmaster General,* 381 U.S. 301, 305), and in Chafee's words, approved in *Kent* (357 U.S. at pp. 126-127), "travel abroad enables American citizens . . . to be well-informed on public issues" and thereby "contributes to sounder [democratic] decisions."

As Chafee puts it further,

> "An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our Government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home."
>
> Chafee, Three Human Rights in the Constitution of 1787 (1956), pages 195-196.

Defendant's conduct at bar in connection with her travels to Cuba parallels precisely the democratic thesis expressed thus by Chafee. Not wishing to be "obliged to form [her] opinions about our foreign policy" as to Cuba solely by what she might be "told by officials of our government or by a few correspondents of American newspapers", she travelled there to see the land for herself. Moreover, as Chafee predicted, she found her "views on domestic questions" too were "enriched by seeing how [others] are trying to solve similar problems." In the words of the Stipulation of Facts at bar,

defendant travelled about Cuba observing "the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health", and took pictures of what she saw. [R. 52.] When she returned she "appeared before various groups and gatherings of her fellow citizens" and told them of her experiences and observations. [*Id.*] Thus did she as one citizen attempt to "contribute to sounder decisions at home." She acted merely as one citizen-participant in the nation's "freedom of discussion", which, in this Court's words, "if it would fulfill its historic function . . . must embrace all issues about which information is needed or appropriate to enable the members of our society to cope with the exigencies of their period." (*Thornhill v. Alabama,* 310 U.S. 88, 102; *Wood v. Georgia,* 370 U.S. 375, 388.)

As respects the subject of Cuba, the informed will of the American people bears upon questions of life and death, not only for themselves but for the planet as a whole. In such a context to say that the American people may know about Cuba only what appears in official declarations of policy is a travesty on the democratic process. Indeed to say that they may know only what is reported by those newsmen and businessmen whose travel to Cuba the proponents of official policy may approve is to offer sources of information only slightly less restricted.

It is no answer to the needs of the American people for information on matters so grave to say that they pertain to foreign relations and that policy in these matters may be determined by appointed officials. For this is to give officialdom the means of perpetuating itself

and insulating its policies from public debate. At all events the people through their representatives are entitled to vote on questions of war and peace and certainly to petition their government concerning matters of foreign relations. The criminal proscription on travel invoked at bar substantially burdens and clogs the processes whereby our citizens can determine their own positions and exert informed pressure upon their representatives at the seat of government. So doing such prohibition violates the root premises of the First Amendment and of self government.

It is true this Court in *Zemel v. Rusk, supra,* 381 U.S. 1, ruled the Department of State has Constitutional power to refuse to issue a passport valid for travel to Cuba under the civil safe-passage side of the passport powers. But involved at bar is a criminal prohibition, not a civil withdrawal of a protective privilege.

It is one thing to say that Government may determine to withdraw from specificied parts of the world for reasons of foreign and diplomatic policy the privilege of the diplomatic safe-passage protection afforded by passports, and may require citizens if they travel to such areas to proceed on their individual responsibility only. It is another thing entirely to say that Government may outright prohibit *any* free travel to administratively-listed areas of the globe on pain of criminal punishment even as to the citizens willing to travel without diplomatic passport protection. It is the latter which is involved here. That issue was expressly reserved in *Zemel v. Rusk,* and this Court should now affirm that under the First and Fifth Amendments the Government may not prohibit and punish such free, innocent travel. That power, and especially in time of

peace as at bar, is inconsistent with the protected liberty of citizens in a self-governing nation.

Moreover, there is a feature of *censorial, discretionary power* in the restriction upon travel to Cuba at bar which is particularly offensive to personal liberty and to freedom of speech, thought and association. The Excluding Cuba Regulation, read with Public Notice 179 and Press Release No. 24 issued simultaneously with it, does not simply and totally prohibit all travel to Cuba. Instead it prohibits such travel subject to *censorial* discretion. Public Notice 179 (Appendix D; 26 Fed. Reg. 492) provides passports shall be "invalid for travel to or in Cuba" "unless specially endorsed for such travel under the authority of the Secretary of State", and Press Release No. 24 (Appendix E; 44 Dept. St. Bull. 178) provides that "exceptions" allowing travel to Cuba will be permitted *only* "to persons whose travel may be regarded as being *in the best interests of the United States* . . ." (Emphasis added.)

Thus the regulatory ban considered in entirety vests the Secretary with "completely uncontrolled discretion" (*Cox v. Louisiana,* 379 U.S. 536, 557) to allow or disallow travel to Cuba at his arbitrary license. He has power, in this area of sensitive First-Amendment-connected liberty, "to act as a censor", and, as well, to jeopardize "the right of [applicants for such travel] not to be denied equal protection of the laws." (*Id.*, at p. 557.) "It is clearly unconstitutional to enable a public official . . . to engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary licensing power" over First Amendment area rights. (*Id.* at p. 557; *Thornhill v. Alabama, supra,* 310 U.S. 88, 97;

Kunz v. New York, 340 U.S. 290, 294; *Saia v. New York,* 334 U.S. 558, 560-561; *Niemotko v. Maryland,* 340 U.S. 268, 271-272; *Cantwell v. Connecticut,* 310 U.S. 296, 305-307; *Largent v. Texas,* 318 U.S. 418, 422.)

As stated by Commager,

> "If the right to travel abroad is to depend on the subjective judgment of some subordinate in the State Department as to whose travel is 'in the best interests of the United States', there is an end—in theory, at least—to freedom of travel. Who determines what are the interests of the United States? Who determines whether a particular passport applicant meets these murky criteria? If everyone who expects to travel must so comport himself as to satisfy the notions of Federal bureaucracy about political ideas, associations, and activities, control over travel may well become a powerful instrument for Federal control of thought."
>
> Henry Steele Commager, as quoted in Hearings Before The Senate Committee on Foreign Relations On Passport Legislation, July 16, 1958, 85th Cong., 2d Sess., p. 184.

The power to censor travel, then, as one of the channels of information affecting public opinion, is tantamount to improper administrative influence over the free molding of public sentiment. In Chafee's words, such arbitrary, licensing power over the right of travel is to be condemned as "one of the worst evils of suppression of freedom of the press" because "[i]t enables government officials to pursue their own policies by keeping the public from learning facts and ideas

which may throw doubt on the soundness of those policies." (Chafee, *supra*, at p. 196.)

A statute creating arbitrary, censorial licensing power over First-Amendment-related liberties, as does the regulatory ban on travel to Cuba at bar, is void upon its face and may be attacked by any citizen "whether or not he applied for a license." (*Freedman v. Maryland*, 380 U.S. 51, 56; *Staub v. City of Baxley*, 355 U.S. 313, 319.) "The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat [of such censure]." In consequence, "[o]ne who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." (*Thornhill v. Alabama*, *supra*, 310 U.S. 88, 97.)

VI.

No Sufficient Presidential Proclamations of Emergency Exist to Support the "Excluding Cuba" Regulation Under Section 1185 at Bar.

Section 1185 by its terms applies during peace time only (1) "during the existence of any national emergency proclaimed by the President", and then only if (2) the President finds and further proclaims "that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon" entries and departures.

It is the contention of the Government that these proclamation requirements have been satisfied by Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, attached hereto as Appendix F, and by Pres-

idential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, attached hereto as Appendix G, which is referred to and adopted in Proclamation No. 3004.

Defendant submits the statutory requirements have not been satisfied.

(1) Firstly, Proclamation No. 3004 makes no proclamation of apprehended need for *geographical* area travel restrictions. Section 1185, in addition to the proclamation of a general "emergency", requires as a condition for any entry or departure restrictions under its criminal sanction that the President find and proclaim "that the interests of the United States require" that "restrictions and prohibitions" upon entries and departures "in addition to those provided otherwise than by this section" be imposed. Since civil restrictions upon area-restricted travel (withdrawal of the safe-passage protections of a passport) clearly exist independent of Section 1185, the requirement of the statute is that before its criminal sanctions may be added the President must first find and proclaim a necessity therefor. What is required is a *specific* finding and proclamation of necessity for *area* or *geographical* restrictions. Proclamation No. 3004 merely finds generally, and in blanket terms, that United States interests require exit and entry restrictions additional to those otherwise existing, but there is no finding of necessity for *geographical* restrictions affecting a traveller's destination.

Section 1185 is a criminal statute and must be narrowly construed, and its precondition that departure restrictions must be found to be "required" must be liberally interpreted in favor of the accused. This means,

it is believed, that as to all restrictions and prohibitions imposed under the statute the President must specifically find that the same, either individually or as a category, are "required" by "the interests of the United States." Applied to the imposing of area destination restrictions—a category of restrictions unique unto itself and one requiring a different basis of justification than restrictions applicable to individuals—the statute requires a *specific* finding of need for such regulations, either individually or at least as a class. Proclamation No. 3004 expresses no such finding under any view, and in consequence, for failure of one of its preconditions, Section 1185 cannot be applied at bar to enforce an area travel restriction such as the Excluding Cuba Regulation.

(2) In any event, no valid, enduring national emergency is shown at bar under Proclamations Nos. 3004 and 2914 sufficient to satisfy the requirements of Section 1185. Proclamation No. 3004, issued January 17, 1953, merely proclaims "the national emergency the existence of which was proclaimed . . . by Proclamation 2914 still exists." Proclamation No. 2914, issued December 16, 1950, in turn proclaimed "a national emergency" bottomed on the Korean War then obtaining; its base premise is now removed and the condition of emergency it declared no longer exists.

The opening and controlling recital of Proclamation No. 2914 reads:

> "WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; . . ."

While there is general reference thereafter in the Proclamation to "world conquest by Communist imperialism" and to the importance of protecting the basic liberties of American life, it is plain that Proclamation No. 2914, issued December 16, 1950, is bottomed upon the Korean War. Proclamation No. 3004, issued January 17, 1953, merely reiterates by recital the "national emergency . . . proclaimed . . . by Proclamation 2914."

Whatever may have been the situation in 1950 and 1953, clearly that situation does not exist today. The Korean War, which was the explicit occasion and basis for "the national emergency" proclaimed in Proclamations Nos. 2914 and 3004, ended July 27, 1953. (13 Encyc. Brit. 467, 474.) There is, therefore, no rational basis for the interference with the basic right of travel today upon the basis an emergency no longer in existence.

This Court is not controlled by an outdated executive proclamation of an emergency which by passage of time has ceased to exist.[18] The Court has independent right, and even duty, to inquire whether there is in fact today such a national emergency as was proclaimed in 1950 and 1953 by Proclamations Nos. 2914 and 3004 sufficient to justify the criminal restriction upon free travel in contest at bar. As stated by Mr.

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[18]As stated, Proclamations Nos. 2914 and 3004 arose out of and spoke to the Korean situation which our government characterized as unprovoked aggressive warfare. Eight years later, in 1961, the Cuban situation bore no resemblance to that in the Korean crisis. There had been, simply, a change of government in Cuba, and its economic policies came into conflict with our interests. There was no war and no threat of war. Cuba had merely selected a politico-economic system with which we disagreed.

Justice Holmes in *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 547-548 (quoted and approved subsequently in *Baker v. Carr,* 369 U.S. 186, 214):

> ". . . [A] court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . And still more obviously, so far as this declaration looks to the future, it can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when past. . . . In our opinion it is open [to a court] to inquire whether the exigency still existed upon which the continued operation of the law depended." (264 U.S. at pp. 547-548.)

Lacking at bar are the care and frequency with which the legislature in *East New York Savings Bank v. Hahn,* 326 U.S. 230, 234-235, reviewed the law there concerned from time to time, and adjusted its terms, based in each case on a full investigation of the facts—displaying thereby "the empiric process of legislation at its fairest." Governmental powers grounded upon war emergency may not be "indefinitely prolonged merely by keeping alive a state of war that ha[s] in fact ended." (*Woods v. Miller,* 333 U.S. 138, 147, Mr. Justice Jackson concurring.)

The lapse of time since the issuance of the proclamations here, together with the judicially noticeable matters set out in this branch of the argument, render the proclamations presumptively inoperative. Surely the changing kaleidoscopes of international relations and

political maneuvers are not the sort of fact situations entitled to any presumption of continuance. Indeed, just the opposite of such a presumption would seem required. (See, *e.g. Maggio v. Zeitz,* 333 U.S. 56; *Colt v. United States* (C.A. 5, 1946), 158 F. 2d 641; *United States v. Patterson* (C.A. 2, 1955), 219 F. 2d 659.))

VII.

Defendant Departed Not for Cuba but for Mexico, and Without Even Prior Request for Permission to Enter Cuba; Properly Construed and Constitutionally Limited, Section 1185 Does Not Reach Such a Departure.

When defendant departed the United States on the dates charged in the indictment she went to Mexico, not to Cuba. Only *after* her United States departure, and *after* her arrival in Mexico in each instance, did she apply for and ultimately secure Cuban permission to enter Cuba. Accordingly, at the time of each of her "departures" from the United States she had no *ability* to, and she did not, "depart" without a passport from the United States "*for* the Republic of Cuba" "a place outside the United States for which a valid passport is required" [Indictment; R. 1-2, emphasis added] within the meaning of Section 1185.

The facts dealing with defendant's departures on each of the dates charged in the indictment, January 22 and August 18, 1962, are set forth in paragraphs 4 and 7 of the Stipulation of Facts [R. 50-51]. On each occasion she crossed the United States border into Mexico, without need for any passport, travelling on the first occasion by airplane and on the second, by automobile. In each instance "at the time she departed" she "did not have Cuba's permission to enter

Cuba" and she "intended to seek permission . . . to visit Cuba" from representatives of Cuba "in Mexico". Thus when she departed the United States she had no power to go to, or leave "for", Cuba. She intended to seek permission to enter Cuba only *after* arrival in Mexico, and she in fact did so apply and obtained Cuba's permission to visit Cuba on the first occasion four days after her departure from the United States. and on the second occasion, twelve days after she departed the United States.

Section 1185 covers only *dpearture*; it operates only on the facts existing at the moment of such departure. Properly construed and Constitutionally limited, it cannot apply to the facts at bar. To say that departure can be rendered penal by a *subsequent* seeking and obtaining of permission to enter Cuba is to defy reason and to make the statute arbitrary and void in its application under due process fundamentals.

The facts are plain that on each occasion when the defendant left the United States, Cuba was not a country which had agreed to receive her as a visitor or traveller. For there to be a departure from the United States "for" a country, it must be a leaving for a country which is ready to receive the individual concerned. (*Heikkinen v. United States,* 355 U.S. 273, 276.) One cannot depart the country for passport purposes at large so to speak or abstractly; one cannot obtain a passport to travel nowhere. One could sail out on the high seas far beyond the territorial limits and need no passport. He needs a passport when he departs for *another country.* He cannot depart to enter such a country unless that country is ready to receive him.

Thus at the time of her departure the defendant had neither the apparent nor the actual ability to go to

Cuba. Whether such ability would ever come into being was unknown and completely beyond her power. It was not, therefore, within her power to commit the offense charged. See *United States v. Moses* (C.A. 2, 1953), 205 F. 2d 358 and *Liverman v. United States* (C.A. 4, 1958), 260 F. 2d 284. Both of these cases dealt with the offense of possessing an unregistered still. In each case the still had been installed but was not operable because of the need for repairs and adjustments. Since the offense consisted of possessing an operable still, judgments of conviction were reversed. In the case at bar defendant's conduct fell far short of that in the cited cases. Whatever her state of mind when she left the United States, the defendant was unable factually and legally to go to Cuba until she obtained that country's consent for her entry. She did not have that consent when she left the United States borders, and she did not even apply for it until after she got to Mexico City. There is nothing to show that she had even an assurance that such consent would be obtained when she applied. The consummation of her preparations rested upon facts and volition utterly independent of her conduct or will.

Thus the facts here fall short even of attempt. *Cf. Lemke v. United States* (C.A. 9, 1954), 211 F. 2d 73, cert. den. 347 U.S. 1013; *United States v. Coplon* (C.A. 2, 1950), 185 F. 2d 629. In those cases the defendant had engaged in conduct falling just short of the completion of the crime when his conduct was interrupted by police officers who sought to frustrate the defendant's criminal purpose. In each case, preparations were extensive and the defendant's criminal purpose could have been accomplished by his own volition and conduct but for the intervention of others.

Such is not the situation here where defendant's preparations could not bring her even close to consummating entry into Cuba, for that turned upon action of the Cuban Government utterly independent of her power and will.

The inapplicability of the statute at bar to a departure such as the defendant's can be well illustrated by asking that would happen under the statute as the Government construes it if the defendant on arrival in Mexico and on requesting Cuban entry permission had been refused such permission, or, in Mexico, had requested and obtained permission to enter Cuba but because of other circumstances did not in fact travel there. By the Government's thesis the offense would nonetheless be complete because complete at the moment of departing, regardless of whether travel to Cuba should actually eventuate or not.

The Government's interpretation is unreasonable and arbitrary. The statute should be limited and construed not to apply to departures as at bar where at the time of departure there does not exist *ability* to enter (by existing permission) the country travel to which requires a passport not possessed.

Conclusion.

Wherefore, upon all of these reasons and considerations set forth above, the judgment of conviction below should be reversed.

Respectfully submitted,

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APPENDIX A.

Section 1185 of Title 8 of the United States Code enacted as Section 215 of the Immigration and Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, reads in material part as follows:

Travel Control of Citizens and Aliens During War or National Emergency—Restrictions and Prohibitions on Aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * *

Citizens

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Penalties

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; * * *.

APPENDIX B.

The "Excluding Cuba" Regulation, January 16, 1961, Dept. Reg. No. 108.456, 26 Fed. Reg. 482 (amending 22 C. F. R. Sec. 53.3 which follows immediately as Appendix C), reads in full as follows:

Dept. Reg. 108.456.

PART 53 — TRAVEL CONTROL OF CITIZENS AND NATIONALS IN TIME OF WAR OR NATIONAL EMERGENCY
EXCEPTIONS TO REGULATIONS

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, dated March 31, 1938, issued under the authority of section 1 of the act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), and section 4 of the act of May 26, 1949 (63 Stat. 111; 5 U.S.C. 151c), I hereby amend paragraph (b) of 53.3, Exceptions to regulations in §53.2 of Title 22 of the Code of Federal Regulations to read as follows:

§53.3 Exceptions to Regulations in 53.2

* * *

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent threreto: *And provided also,*

That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(Sec. 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004 dated January 17, 1953, 18 F.R. 489)

The regulation contained in this order shall become effective upon publication in the FEDERAL REGISTER. The provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) relative to notice of proposed rule making and delayed effective date are inapplicable to this order because the provisions thereof involve foreign affairs functions of the United States.

Dated: January 16, 1961.

For the Secretary of State.

LOY W. HENDERSON
Deputy Under Secretary for
Administration.

(F.R. Doc. 61-506; Filed, Jan. 18, 1961; 8:54 a.m.)

APPENDIX C.

The regulations appearing in Part 53 of Title 22 of the Code of Federal Regulations in their *unamended form* as they appeared *prior to January 16, 1961* (i.e. before promulgation of the "Excluding Cuba" Regulation reproduced in Appendix B above), read in material part as follows:

Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

§53.1 *Definition of the term "United States."* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in §53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in §53.3.

§53.3 *Exceptions to regulations in §53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

* * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided,* That this exception shall not be appli-

cable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; * * *.

APPENDIX D.

Public Notice 179, January 16, 1961, 26 Fed. Reg. 492, reads in full as follows:

DEPARTMENT OF STATE

[Public Notice 179]

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 C.F.R. 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specially endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for
Administration

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APPENDIX E.

Press Release No. 24, January 16, 1961, 44 Dept. of State Bull, 178, reads in full as follows:

PRESS RELEASE No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

APPENDIX F.

Presidential Proclamation, No. 3004, January 17, 1953, 67 Stat. C31, reads in material part as follows:

A Proclamation

WHEREAS section 215 of the Immigration and Nationality Act, enacted June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of Title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * *

5. I hereby direct all departments and agencies of the Government to cooperative with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pur-

suance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

APPENDIX G.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, reads in material part as follows:

A Proclamation

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 67

HELEN MAXINE LEVI TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 176

UNITED STATES OF AMERICA, APPELLANT

v.

LEE LEVI LAUB, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court in No. 67 (TR. 94–100)[1] are reported at 241 F. Supp. 468, 472. The order of the district court dismissing the indictment

[1] "TR." represents the printed record in this Court in No. 67 and "LR." represents the record in No. 176.

232-042—66——2

in No. 176 (LR. 5–7) is unreported. The opinion of the district court in the related case of *United States* v. *Laub* (LR. 8–62) is reported at 253 F. Supp. 433. The opinion of the court of appeals in No. 67 (TR. 109–112) is reported at 353 F. 2d 506.

JURISDICTION

No. 67.—The judgment of the court of appeals (TR. 112) was entered on November 19, 1965, and a petition for rehearing was denied on January 4, 1966 (TR. 133). The petition for a writ of certiorari was filed on January 28, 1966, and was granted on April 18, 1966 (TR. 113; 384 U.S. 903). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

No. 176.—The district court's order dismissing the indictment was entered on May 5, 1966 (LR. 5–7). A notice of direct appeal to this Court was filed on May 20, 1966 (LR. 63), and this Court noted probable jurisdiction on June 13, 1966 (LR. 64; 384 U.S. 984). The jurisdiction of this Court rests upon 18 U.S.C. 3731 because the district court's dismissal of the indictment was "based upon the * * * construction of the statute upon which the indictment * * * is founded."

QUESTIONS PRESENTED

The questions presented in both cases are:

1. Whether violations of area restrictions upon international travel imposed by the Secretary of State are criminally punishable under Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b).

2. Whether Section 215(b), if so construed, is constitutional.

Additional questions presented in No. 67 are:

1. Whether Section 215(b) applies to travel to Cuba, although the provision was not expressly cited in the promulgating clause of the regulation imposing the restriction upon travel to that area.

2. Whether the President properly declared a state of national emergency justifying the imposition of area restrictions.

3. Whether petitioner violated Section 215(b) by leaving the United States for Mexico with the intention of traveling to Cuba if that country would admit her, and by thereafter traveling to Cuba.

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The statutes, proclamations, executive orders and regulations involved are set out in the Appendix, pp. 45–47, *infra*.

STATEMENT

Prior to 1961, no passport was required for travel in the Western Hemisphere, including Cuba. 22 Fed. Reg. 10836. On January 3, 1961, the United States broke diplomatic and consular relations with Cuba. Subsequently, citing the Passport Act of 1926 (22 U.S.C. 211a) and Executive Order 7856 (3 Fed. Reg. 799, 805–806), the Secretary of State on January 16, 1961, issued Public Notice 179 (26 F.R. 492) (pp. 55–56, *infra*), which declared all outstanding United States passports to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State." A

companion press release (Press Release No. 24; pp. 56–57, *infra*) stated that the Department of State contemplated granting exceptions to these travel restrictions for "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests." On January 16, 1961, the Secretary issued Departmental Regulation 108.456 (26 Fed. Reg. 482) which, by amending 22 C.F.R. 53.3, excluded Cuba from the countries of North, Central and South America for which a valid passport is not required.

No. 67.—Petitioner was charged in a two-count indictment in the United States District Court for the Southern District of California with having willfully departed from the United States for Cuba via Mexico without a passport valid for Cuba, in violation of Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b) (TR. 1–2). Waiving trial by jury (TR. 48–49), she was tried on stipulated facts (TR. 49–52), and was convicted on both counts (TR. 101). She was sentenced to concurrent suspended six-month terms of imprisonment on each count and to pay a total fine of $1,000 (TR. 102–103). The court of appeals affirmed the conviction (TR. 109–112).

According to the stipulation, petitioner, an American citizen, obtained tourist permits to travel to Mexico in January and August 1962 (TR. 50, 51). On both occasions, she left the United States for Mexico (once by plane and once by automobile) with the intention of there seeking from the Cuban au-

thorities permission to travel to Cuba and of traveling from Mexico to Cuba if such permission were granted (*ibid.*). She did not then possess a passport specifically endorsed for travel to Cuba,[1] and she knew of 22 C.F.R. 53.3(b) (p. 54, *infra*), which then excluded Cuba from the areas of the Western Hemisphere for which no passport is required (TR. 51). On each occasion, some time after arriving in Mexico, petitioner applied to the Cuban authorities and received from them permission to enter Cuba. She then boarded a plane which left from the Central Airport in Mexico to Havana, Cuba (TR. 50–51). While in Cuba she traveled, observed and took photographs, and subsequently reported on her trips to various groups in the United States (TR. 51–52).

No. 176.—Appellees were charged in a one-count indictment filed in the United States District Court for the Eastern District of New York with conspiring to violate Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b), by inducing, recruiting and arranging for the travel to Cuba of American citizens who did not possess passports

[1] The stipulation states only that "[a]t no time pertinent or material herein did defendant * * * bear a valid United States passport specifically endorsed for travel to the Republic of Cuba" (TR. 51). Hence the record is unclear as to whether petitioner had no passport at all, a revoked or expired passport, or a passport which was valid except for travel to restricted areas. The district court in the *Laub* case was advised informally by the judge in *Travis* that petitioner "did not have *any* unexpired passport when she made the two departures for Cuba" (LR. 24; emphasis in original). We have been advised that she possessed a *revoked* passport. See pp. 43–44, *infra*.

valid for travel to that country (LR. 1–2). The indictment alleged that it was part of the appellees' conspiracy to promote and solicit such unlawful travel by American citizens and to arrange for transportation to Cuba "by way of Europe" (LR. 2). In response to a motion for a bill of particulars, it was alleged that the individuals whose travel had been solicited possessed "unexpired and unrevoked United States passports which * * * had not been specifically validated by the Secretary of State for travel to Cuba" (LR. 4).

The district court granted appellees' motion to dismiss the indictment (LR. 5–7), incorporating into its judgment by reference its opinion in *United States* v. *Laub*, a companion case involving two of the appellees and two other defendants, who had been indicted on a similar charge relating to an earlier trip to Cuba (LR. 8–62). In that case, which had been tried before the same district judge without a jury, the court had acquitted the defendants on the ground that departures from the United States with unexpired and unrevoked passports do not violate Section 215(b) even if the departing individuals contemplate travel to an area upon which a restriction has been imposed by the Secretary of State (LR. 45).

SUMMARY OF ARGUMENT

I

A. In *Zemel* v. *Rusk*, 381 U.S. 1, this Court sustained the power of the Secretary of State to refuse to validate passports for travel to Cuba, but it reserved the question whether an individual who de-

parts the United States to engage in such travel violates Section 215(b) of the Immigration and Nationality Act of 1952. 381 U.S. at 18–20. The language of Section 215(b) is broad enough to cover such conduct. It requires every citizen who departs the United States during a national emergency to bear a "valid" passport. The "validity" of a passport turns not merely on whether it is unexpired and unrevoked; the statutory definition of the term "passport" indicates that Congress deemed validity "for * * * entry * * * into a foreign country" as an integral part of such a document. A passport which is invalid for the country to which the traveler is destined is, therefore, as defective under Section 215(b) as an expired or revoked passport.

The district court in *Laub* erroneously assumed that Section 215(b) was merely a "border control" measure. In fact, it is quite clear that in carving out exemptions to the prohibitions of Section 215(b), the Executive has distinguished among travelers on the basis of the countries to which they are traveling. Hence the statute cannot be read as a mere "departure and entry" provision.

B. The legislative history of Section 215(b) must be read in light of the Department of State's wartime passport practices because the Congresses which enacted such legislation during the World Wars were expressly providing wartime measures only. During World War I, the Department of State validated passports only "for specific countries and for specific purposes." Section 215(b)'s command that a "valid" passport be possessed by any citizen leaving

the United States in time of war or national emergency—which was copied from similar statutes passed in 1918 and 1941—must be read as referring to that practice. In light of that practice, Congress could not have been intending in 1918 and 1941 to permit departures for geographic areas other than those for which travelers' passports were specifically validated.

To be sure, the Department of State has not called this application of Section 215(b) to public attention as much as it might have, and State Department representatives have occasionally suggested that no criminal sanctions lie behind the Secretary's area restrictions. Neither these statements—many of which are ambiguous—nor the various unsuccessful attempts to enact legislation dealing more specifically with this problem than does Section 215(b) are, however, determinative of the issue of statutory construction presently before the Court. See *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. The Department of State's recent view is clearly expressed in the endorsement on passports which warns travelers that if they go to a geographically restricted area, they "may be liable for prosecution under Section [215]."

C. The defendants in these cases cannot complain that they were not given ample warning. They knew that travel to Cuba would violate a condition of their passports and that the possession of a "valid" passport was a condition of departure. This is not a case in which conduct which might have been thought to be totally innocent has been subjected to criminal punishment.

II

A. This Court's rejection of the constitutional arguments made in *Zemel* v. *Rusk*, 381 U.S. 1, notwithstanding its recognition that refusal to validate passports for travel to Cuba deters travel to that area, is a complete answer to the First and Fifth Amendment challenges made by the defendants in these cases. Having held that a restriction upon foreign travel is an inhibition upon action and not upon speech, this Court should reject the claim made by petitioner Travis that the power to permit travel to Cuba confers a censor's discretion upon the Secretary of State.

B. The excessive delegation argument was similarly made and rejected in *Zemel*. The Executive has necessarily been granted broad discretion in the area of foreign relations because of the volatile nature of international relations. Congress created the crime—departure without a valid passport—and left to the Secretary only the standards of validity. There is, consequently, no substance to the claim that the Executive has been given the power to determine what conduct will be criminal.

III

Section 215(b) applies even though that provision was not cited in the promulgating clause of the "Excluding Cuba" regulation. The defendants were charged with violating the statute, not the regulation; hence there is no need to find a specific reference in the regulation to the authority conferred by the statute. Moreover, Section 215 is cited in the official reporter of governmental regulations.

IV

The presidential proclamations which are the "triggers" for Section 215 are still in effect and their basis is not a subject for judicial examination. The statute confers only on the Executive and on Congress the power to repeal the state of national emergency which brings into play the restrictions of Section 215.

V

Petitioner Travis departed the United States with the intention of traveling to Cuba if that country would admit her. Area restrictions would be meaningless if her subsequent entry into Cuba were not deemed criminal simply because it was not certain at the time of her departure that Cuba would permit her to enter.

ARGUMENT

I

AMERICAN CITIZENS WHO LEAVE THE UNITED STATES DURING A NATIONAL EMERGENCY BOUND FOR A DESTINATION WITH RESPECT TO WHICH THEIR PASSPORTS ARE INVALID VIOLATE SECTION 215(b) OF THE IMMIGRATION AND NATIONALITY ACT

In *Zemel* v. *Rusk*, 381 U.S. 1, this Court sustained the power of the Secretary of State to impose area restrictions upon travel abroad by American citizens. The Court held that the power had been conferred by the Passport Act of 1926, 22 U.S.C. 211(a), which generally authorized the Secretary of State to "grant and issue passports * * * under such rules as the President shall designate and prescribe * * *." While noting that neither the legislative history nor

the language of the 1926 Act expressly manifests an intention to authorize area restrictions, the Court held that the breadth of the statutory language and the Executive's consistent practice—well known to Congress—of imposing such restrictions during periods of national emergency warranted the conclusion that Congress "intended in 1926 to maintain in the Executive the authority to make such restrictions." 381 U.S. at 9. Our contention that Section 215(b) subjects to criminal penalties any American citizen who departs the United States for an immediate or ultimate destination with respect to which his passport is invalid rests on much the same considerations.

Section 215(b) does not, in so many words, prohibit violations of area restrictions; it speaks, as the district court noted in the *Laub* case (L.R. 42), in the language of "border control statutes regulating departure from and entry into the United States." But, for reasons explained below, we believe that, as in *Zemel*, the text is broad enough to encompass departures for geographically restricted areas, and the consistent practice known to Congress when Section 215(b) and its predecessor were enacted renders it unlikely that Congress intended to leave the large gap in enforcement of area restrictions which would result from the decision of the district court in *Laub*.[1]

[1] We take as our premise and do not repeat here the history of the Cuban threat to the security of the Western Hemisphere and of area restrictions in general which are discussed in great detail in our brief in *Zemel* v. *Rusk*, No. 86, O.T. 1964, pp. 21–66. On the basis of that material, the Court concluded in *Zemel* that the restriction upon travel to Cuba was "supported by the weightiest considerations of national security." 381 U.S. at 16.

A. THE LANGUAGE OF SECTION 215(b) IS BROAD ENOUGH TO COVER VIOLATIONS OF AREA RESTRICTIONS

Section 215(b) declares it unlawful, in times of war or national emergency, for any citizen of the United States "to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." On its face, the statute requires not only that the traveler possess a passport when he departs, but that the passport be a "valid" one. The district court in *Laub* construed the adjective "valid" as relating only to whether the passport has been revoked or has expired. In so doing, the court overlooked a third element—*i.e.*, whether the passport has been validated for the traveler's intended destination. Our position, stated succinctly, is that a passport's "validity" within the meaning of Section 215(b) does not alone depend on its status as unexpired and unrevoked; it is "valid" only for such travel as the Secretary of State authorizes. Having the power to issue passports, the Secretary also has the necessarily included power of imposing conditions and limitations upon the validity of such documents. No one would argue that the Secretary may not fix a period of years less than the statutory maximum (22 U.S.C. 217a) for which a passport is to be valid. Anyone then departing with an out-of-date passport has clearly violated Section 215(b). The same result obtains, we submit, when the passport is invalid on another ground. Thus, today, when passports are declared "invalid" until the bearer signs on a designated line, departure with an unsigned passport likewise violates the statute. Similarly, we submit, Section 215(b) would

apply to a citizen who left the country in violation of a restriction on departures by certain kinds of vehicles—assuming these were a rational and permissible basis for such a restriction. In sum, any condition of validity which the Secretary imposes is as much an element of a passport's "validity" for purposes of Section 215(b) as the passport's expiration date.

1. Indeed, the condition which these cases involve—a limitation upon the foreign states to which the passport is addressed—is related in a much more fundamental sense to the essential nature of a passport than technical conditions such as an expiration date. "Passport" is defined in Section 101(30) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(30), as follows (emphasis added):

> The term "passport" means any travel document issued by competent authority showing the bearer's origin identity, and nationality if any, *which is valid for the entry of the bearer into a foreign country.*

The concluding language of the above definition demonstrates that a "travel document" which otherwise appears to be a passport is not a passport in the statutory sense until it is validated "for entry * * * into a foreign country." This Court observed in *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699, that a passport "is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely * * *." If a traveler is destined for a foreign country with a passport which is not "addressed" to the government of that country,

he is traveling with no passport at all. For, as the Department of State observed in a 1957 response to a Senate committee, a passport "is always a request to another government for safe conduct of the bearer." *Hearings Before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957), p. 59. In the same response, the Department noted its position that an endorsement on a passport reading "'Not valid to go to country X' * * * means that as far as the United States is concerned, the passport is not valid for use in travel to country X." *Ibid.*

To be sure, as this Court observed in *Kent* v. *Dulles*, 357 U.S. 116, 129, the age-old function of a passport is presently its subordinate role; "[i]ts crucial function today is control over exit." But whether it suffices as a document controlling exit is not the complete test of a passport's validity. The statute defines passport as a document "valid for the entry of the bearer into a foreign country" not as one "valid for the departure of the bearer from the United States." This choice of language must mean that a passport does not meet the statutory conditions unless, so far as the Secretary of State has the power to do so, he has authorized the bearer not only to depart the United States but to enter the country to which he is destined.

Nor can the words "entry * * * into a foreign country" be read as meaning "entry * * * into *any* foreign country," thereby validating for purposes of departure under Section 215(b) a travel document which authorizes entry into a foreign country other than that to which the traveler is destined. A docu-

ment authorizing entry into country *X* and thereby addressed to the government of *X* is hardly of use to a traveler destined for *Y*. It does, of course, inferentially authorize him to leave the United States, but it does not, in any meaningful sense, authorize entry. Having determined that a necessary constituent of a passport be that it "is valid for * * * entry," Congress could not rationally have intended that a validation for any entry whatever—even if it be to a country in which the traveler has no prospect of setting foot—satisfies this requirement. We submit that Section 101(30) must be read as meaning that an authorizing travel document qualifies as a "passport" only if it is valid for entry into the foreign country or countries to which the traveler is destined. It follows, then, that the prohibition in Section 215(b) against departures without "valid" passports bars departures with passports which are invalid for the foreign country to which the traveler is destined.

This conclusion is further supported by the obvious gap which affirmance of the judgment in *Laub* would leave in the implementation of the important foreign policy considerations which underlie area restrictions. For if Section 215(b) does not make travel to Cuba criminal, there is no real way to prevent the entry into Cuba of individual citizens, who may have no baser motive than curiosity but who can thereby "involve the Nation in dangerous international incidents." *Zemel* v. *Rusk*, 381 U.S. 1, 15. The provisions in the Criminal Code relating to misuse of passports (18 U.S.C. 1541-1546), particularly Section

1544, which prohibits use of a passport "in violation of the conditions or restrictions therein contained," would not appear to apply when, as is usually the case, entry into the prohibited area is accomplished without "use" of the passport. There is no indication, in other words, that petitioner Travis exhibited or otherwise "used" her passport in gaining entry to Cuba. And the provision governing the making of false statements in an application for a passport would plainly not apply if no application were made (*i.e.*, if a passport previously issued for another trip were used for travel to Cuba) or if the application listed only other foreign countries which the traveler intended to visit.

The construction of Section 215(b) which the district court and court of appeals adopted in the *Travis* case and which we urge here was also adopted by the Court of Appeals for the Fifth Circuit in *Worthy* v. *United States*, 328 F. 2d 386. While the court there reversed a conviction under Section 215(b) for having unlawfully entered the United States,[4] it noted (328 F. 2d at 391; emphasis added):

> The appellant puts forward the proposition that the intent and purpose of the Congress was to make criminal clandestine departures from or

[4] Worthy, a newsman, traveled to Cuba without a passport. He was indicted for and convicted of a violation of section 215(b) in that he *entered* the United States without a valid passport. The Court held that the entry provision of the statute was unconstitutional because it deprived a citizen of his "inherent" right to reenter his own country. No such constitutional inhibition exists on the prohibition of departure without a valid passport. The court of appeals noted that it would have had a different case under the provision of the statute prohibiting departure, 328 F. 2d at 393.

> entries to the United States, and because there was no attempt to conceal his entry, the act did not apply to him. The statute was enacted, beyond doubt, for the purpose stated by the appellant, but it reached much further. *It was the clear intent of the statute to require passports for foreign travel, with some exceptions, to permit reasonable restrictions to be placed upon foreign travel, and to impose criminal penalties for willful violations.* * * *

The position we take here was also approved by the district court in *MacEwan* v. *Rusk*, 228 F. Supp. 306, 310 (E.D. Pa.), affirmed, 344 F. 2d 963 (C.A. 3), which reasoned:

> If the statute is broad enough to prohibit the departure of a citizen from the United States without a valid passport, it is difficult to see why a partial barrier is not within the statute. If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power. * * *

And in *United States* v. *Healy*, 376 U.S. 75, 83, n. 7, this Court assumed, in passing, that Section 215 applied to the restriction upon travel to Cuba.*

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* Appellees had been indicted for forcing the pilot of a private plane to fly them from Florida to Cuba. The court said: However, it may be observed that a trip to Cuba would have been lawful only if appellees had had passports specifically endorsed for travel to Cuba. See Presidential Proclamations No. 2914, Dec. 16, 1950 (64 Stat. A454); and No. 3004, Jan. 17, 1953 (67 Stat. C31); § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185; Department of State Public Notice 179, 26 Fed. Reg. 492, Jan. 16, 1961.

2. The principal error of the district court in *Laub* and of the petitioner in *Travis* (see Travis Br. 11, 20, 23, 25, 35) is their assertion that Section 215(b) is merely a "departure and entry" or "border control" statute and was not intended to regulate the destination of American citizens traveling abroad (LR. 35–37, 41, 45). The most persuasive evidence that Section 215(b) is and always was considered a statute authorizing limitations upon travelers' destinations is the consistent administration of the "exception" proviso of Section 215(b). The statute declares unlawful departures without a valid passport "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe" (p. 47, *infra*). If Section 215(b) were merely a "departure and entry" provision and were not concerned with the destinations of those leaving the United States, it would plainly be out of keeping with the statute's tenor to issue exceptions which depend upon where a traveler is headed. Yet, as the district court noted in *Laub*, exceptions promulgated by the President shortly after the original version of the statute was enacted in 1918 fell into two categories: (1) "Military and naval personnel, as well as other classes of government personnel, were permitted to depart and enter without bearing valid passports"; (2) "Americans travelling between the United States and Canada, likewise, were not required to be the bearers of valid passports upon departure and entry (this exception was eventually expanded to include the entire Western Hemisphere)" (LR. 43). See 22 C.F.R. 53.3;

p. 54, *infra*. The first of these categories is, we agree, an exception to a "departure and entry" prohibition. The second, however, cannot be reconciled with the proposition that the statute was designed only as a form of "border control" (I.R. 42). It plainly distinguishes among travelers on the basis of their destinations. An individual without a passport who departs for a Central American country commits no offense; the same traveler destined for Europe violates Section 215(b).

The fact that the President may excuse travelers to Central America from the passport obligation of Section 215(b) does not *ipso facto* establish that the statute gives him the power to make certain destinations impermissible. But it does demonstrate that the statute accords the Executive the authority to reach beyond a travelers' bare departure from the United States and to impose obligations dependent upon the countries to which he is destined. For example, the regulation which exempts travelers in the Western Hemisphere from the passport requirement contains a proviso which makes the exemption inapplicable if the Western Hemisphere country is merely a way-station on a trip to a place for which a valid passport is required. 22 C.F.R. 53.3(b); p. 54, *infra*. That proviso is clearly a permissible exercise of the power which Section 215(b) confers on the President to issue "such limitations and exceptions as [he] may authorize and prescribe" (p. 47, *infra*). The "limitations and exceptions" power may, we submit, as readily be exercised to incorporate into the "validity" of a passport the power conferred on the Secretary

of State to impose area restrictions—which was upheld by this Court in *Zemel* v. *Rusk*, 381 U.S. 1—as to exempt other geographical areas entirely from the passport requirement—a power nowhere specifically delegated to any Executive official. Since, as we have shown, Congress did not intend to deny the President the power to make the criminal sanctions of Section 215(b) contingent upon a traveler's destination, those sanctions apply when, as here, the travelers departed from the United States destined for a country to which their passports had been endorsed as "not valid."

B. THE LEGISLATIVE HISTORY AND ADMINISTRATIVE INTERPRETATION OF SECTION 215(b) ARE CONSISTENT WITH ITS APPLICATION TO VIOLATIONS OF AREA RESTRICTIONS

We agree with the district court in *Laub* (LR. 42) and with petitioner in *Travis* (Travis Br. 22–24) that the most pertinent legislative history is that of the passage of the Act of May 22, 1918, 40 Stat. 559, since it was that statute which was substantially reenacted in 1941 (55 Stat. 252) and as Section 215 of the Immigration and Nationality Act of 1952. The House and Senate reports pertaining to the bill which became the 1918 Act are meager, and they do not address themselves to the question whether the statute was to be deemed violated by those who traveled from the United States contrary to area restrictions. See H. Rep. No. 485, 65th Cong., 2d Sess. (1918); S. Rep. No. 431, 65th Cong., 2d Sess. (1918). Nor do the debates on the floor of either chamber show any awareness of this problem by the sponsors of the legislation or those who questioned them. See 56

Cong. Rec. 6029–6032, 6061–6068 (House), 6191–6195, 6246–6248 (Senate). The district court drew from this silence the inference that Congress was not then concerned with *where* departing citizens traveled, but only with *whether* they were permitted to depart. But that conclusion overlooks the Department of State's then outstanding passport policies. For the reasons stated below, we believe that the 1918 legislation, *construed in light of what Congress then knew regarding wartime passport policies*, was intended to subject to criminal sanctions any person who departed in violation of a geographical restriction in his passport.

The 1918 Act was passed as a war measure (see 56 Cong. Rec. 6030, 6191);* indeed, unlike Section 215(b), it was expressly applicable only "when the United States is at war" (40 Stat. 559). It was the subject of unpublished hearings before the House Committee on Foreign Affairs (56 Cong. Rec. 6030), and among the witnesses testifying in support of the legislation at the hearings were the Acting Secretary of State, the Counsellor of the Department of State and the Chief of the Bureau of Passports. 56 Cong. Rec. 6031. After hearing their testimony, it is hardly probable that the House Committee and, through it, the Congress itself, were unaware of the wartime passport policy of the Department of State, summarized in a 1957 response to questions from the Sen-

*The Chairman of the House Committee on Foreign Affairs (Rep. Flood) was asked (56 Cong. Rec. 6030):

> Mr. Moore of Pennsylvania. The gentleman advances this as a war measure and puts it on that ground?
>
> Mr. Flood. Absolutely. It is limited to the duration of the war.

ate Committee on Foreign Relations (*Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957), pp. 63–64):

> For some years prior to the outbreak of World War I, passports were valid for all countries. Beginning December 9, 1914, passports were made valid for specific countries and for specific purposes. This practice continued throughout the war. * * *
>
> In other words, a passport issued during World War I was not, like the analogous document issued today, a general authorization to travel with enumerated exceptions. It was, instead, issued "for specific countries and for specific purposes," and was valid only for the limited travel endorsed thereon.
>
> The Congress which passed the Act of 1918 doubtless knew of this wartime form of passport. Having enacted a statute which made a "valid passport" a necessary condition of wartime departure from the United States, Congress could not, we submit, have

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With the outbreak of World War I, the following endorsement was placed on passports which were issued or submitted for renewal (9 Am. J. Int'l L. (Spec. Supp. 1915) 383):

> The person to whom this passport is issued has declared under oath that he desires it for use in visiting the countries hereinafter named, for the following objects:
>
> (Name of country.) (Object of visit.)
>
> (Name of country.) (Object of visit.)
>
> (Name of country.) (Object of visit.)
>
> This passport is not valid for use in other countries except for necessary transit to or from the countries named, unless amended by an American diplomatic or principal consular officer.

intended to leave the gap which the district court in *Laub* believed had been left—*i.e.*, to impose no criminal penalty upon individuals leaving from the United States for destinations other than those for which their passports had been endorsed. What Congress must have intended was to close the country's borders altogether except to the extent travel was specifically authorized by an appropriate governmental agency. Any citizen departing without a "valid passport"—i.e., without any passport at all or without a passport endorsed for his destination—was subject to criminal sanctions.

The Act of 1918, in other words, imposed the existing State Department policies regarding passports on any citizen planning to depart from or enter the country. It was then standard practice, of several years' standing, to limit all passports for travel to defined areas. That practice must have been what Congress had in mind when it prescribed a "valid passport" as a condition of departu[illegible]. The statute was intended, we submit, to make it unlawful to travel to areas for which the State Department refused to issue a passport. The effect was not limited to enemy territory, for in 1919 the Department refused to issue passports for "unnecessary" travel to Europe. The Department explained (3 Hackworth, *Digest of International Law* (1942), p. 530):

> The passport restrictions are maintained first because the Department deems it inadvisable in general to allow unnecessary travel between this country and Europe before peace has been declared, and second, because of conditions in Europe, particularly in the shortage of food

and overtaxing of transportation and other services.

The 1918 statute lapsed, by its own terms, with the end of the war, and the passport-bearing requirement was not reenacted into law until World War II. In the interim, the Department of State had imposed area restrictions upon Ethiopia, China and Spain. And, with the beginning of hostilities in Europe, the Department of State again required (except for travel in the Western Hemisphere) that passports "set forth the specific countries to be visited and the purpose of the travel." *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies,* 85th Cong., 1st Sess. (1957), p. 64. See Department Order No. 811, 4 Fed. Reg. 3892. Against that background, Congress in 1941 substantially reenacted the 1918 statute, again prescribing a "valid passport"—which meant, in light of the existing practice, one that set forth the specific countries to be visited and the purpose of the travel"—as a condition of departure. (Act of June 21, 1941, 55 Stat. 252.) Some indication of the meaning ascribed to the 1941 legislation emerges from the President's subsequent issuance of regulations listing the exceptions to the 1941 act, which stated, as does the present 22 C.F.R. 53.8 (p. 55, *infra*), that (6 Fed. Reg. 6070):

> Nothing in these rules and regulations shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the

purpose of restricting its validity or use in certain countries.

The 1952 statute has, as the district court noted in *Laub*, "no independent legislative history" (L.R. 42). But relevant in determining Congress' understanding of the term "valid passport" is the fact that area restrictions had been imposed on travel to Hungary and Czechoslovakia in 1951 and that in May 1952—one month before the enactment of the Immigration and Nationality Act of 1952—the Department of State announced that thereafter all passports would be stamped (State Department Press Release No. 341, May 1, 1952, 26 Dept. of State Bull. 736):

> This passport is not valid for travel to Albania, Bulgaria, China, Czechoslovakia, Hungary, Poland, Rumania, or the Union of Soviet Socialist Republics unless specifically endorsed under authority of the Department of State as being valid for such travel.

Our argument with respect to the history of these acts rests, therefore, not on what legislative reports or debates expressly say. It is founded rather on the premises from which Congress must have proceeded when it passed the statutes of 1918, 1941 and 1952. On each occasion, the Department of State's passport policy was geographically restrictive: a passport was "valid" only for certain destinations. In enacting Section 215(b) and its predecessors Congress must, we believe, have incorporated this standard of validity into the statute.

The district court in *Laub* placed substantial reliance on the fact that Section 215(b) does not ex-

pressly prohibit travel to proscribed areas as well as * * * prohibit departure and entry * * *" (LR. 41). But the fact that Congress framed the statute in general terms, thereby incorporating whatever permissible standards of validity the Secretary of State might deem it prudent to impose, does not mean that it intended to withhold the power to impose area restrictions. The general purpose of the statute was, we believe, to subject departures from this country to stricter controls in a variety of ways, among which were the regulation of travelers' destinations. A more specific enumeration of that particular restriction might have been construed (under the maxim *inclusio unius exclusio alterius*) as intended to deprive the Secretary of the power to impose other kinds of conditions.

Moreover, Congress may well have been reluctant to subject to criminal punishment within the United States the bare act of "travel to proscribed areas" because that would appear to be extraterritorial legislation. The criminal act would, under such a statute, consist of no more than the crossing of a foreign border. By framing Section 215(b) as it did, Congress subjected to criminal sanctions the act of departing the United States with specific intent to enter a prohibited area. The fact that the realization of that intent—i.e., the crossing of the foreign border—may also be an essential element of that offense does not render the present statute extraterritorial. The offense defined by Section 215(b) hinges on the validity of the passport; whether or not the passport is valid depends upon the destina-

tion to which the traveler actually goes. If he never enters a restricted area he has not, irrespective of his state of mind, departed without a valid passport. The departure is the nub of the offense. The entry into the restricted area is a form of condition subsequent, just as, for example, the commission of an overt act would be under the federal conspiracy statute, 18 U.S.C. 371.

Nor are the petitioner in *Travis* (Travis Br. 32-35) and the district court in *Laub* (LR. 38-41) correct in relying on the failure of the Congress to enact proposed legislation to make the violation of area restrictions a crime. Because Section 215(b) was not as explicit in prohibiting violations of area restrictions as it might be, the President and the Department of State have repeatedly sought to put the matter beyond dispute. That is common practice. As the Court recently noted in *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 610, "[p]ublic policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations," (quoting from *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47). But, as the Court there concluded, "requests by government agencies and the resulting nonaction of the Congress [should not be construed] as affirmative evidence of no authority." 384 U.S. at 610. See also, *United States* v. *du Pont & Co.*, 353 U.S. 586, 590; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349.

It is true that press releases of the Department of State issued in 1919 and 1952 when travel restrictions were imposed did not suggest that Section 215(b) was

applicable or that criminal sanctions might be invoked if area restrictions were violated. See LR. 35–36; Travis Br. 26–27; 3 Hackworth, *Digest of International Law* (1942), p. 530; 26 Dept. of State Bull. 736. But these omissions by the agency charged with administration of the passport provisions are far less substantial than the numerous affirmative disclaimers of agency power which this Court deemed unpersuasive in *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 636–640 (Appendix to dissenting opinion).[8]

The 1952 press release is, moreover, somewhat ambiguous. After announcing that passports would be stamped not valid for travel in Iron Curtain countries, the release said (Press Release No. 341, 26 Dept. of State Bull. 736):

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[8] Petitioner Travis also relies on the Department of State's 1957 response to the Senate Committee on Foreign Relations in which it advised the Committee that the endorsement of an area restriction on a passport "does not necessarily mean that if the bearer travels to country *X* he will be violating the criminal law" (Travis Br. 30–32). The statement is not inconsistent with our present position for two reasons: *First*, Section 215(b) applies only in times of war or national emergency, while the authority to make the restrictive endorsement is not so limited. Compare Section 211a of the Passport Act of 1926, 22 U.S.C. 211a. Consequently, the Department was right in responding that travel in violation of an area restriction is not "necessarily" a violation of the criminal law; it is no violation if there is no national emergency in effect. *Second*, the bearer of a passport with a restrictive endorsement may travel to "country *X*" and not be violating the criminal law if he forms the intention of going there after he has left the United States. It is only if his intended destination when he leaves is country *X* that he can be criminally prosecuted under Section 215(b) if he subsequently enters that country.

> In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the Consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

If the first sentence of this paragraph stood alone it would be fair to conclude that there is no criminal sanction for travel to areas upon which passport restrictions have been imposed. But we submit that the second sentence casts an entirely different meaning upon the whole paragraph, which may be fairly read as saying the following: "By imposing area restrictions the Department is not absolutely prohibiting travel to these areas. If the dangers of travel in these areas are reduced at any particular time or in the case of any particular person, permission to travel will be granted." Such a reading does not, of course, conflict with the view we take here—that departure in violation of area restrictions is forbidden under pain of criminal sanctions.

Irrespective of the implications of its press release, the Department of State generally took the position in Congressional hearings that Section 215(b) applied to departures in violation of area restrictions. See Testimony of Acting Director, Bureau of Security and Consular Affairs, in ***Hearings on the Right to Travel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,***

85th Cong., 1st Sess. (1957), pp. 88-91. The testimony of an earlier administrator of the same bureau, to which the district court referred in *Laub* (LR. 36-37), is plainly unsound and could not have reflected the considered view of the Department of State. That witness testified before a 1956 House committee that a traveler who wished to circumvent the passport requirement of Section 215(b) could leave the United States without a passport for a Western Hemisphere country and go from there to a European destination without violating any prohibition of American law. He said that "once they have left the United States, any inhibitions on travel abroad are not as a result of our laws, but the laws of other countries." *Hearings on the Immigration and Nationality Act before a Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess. (1956), Ser. 24, p. 4. This conclusion conflicts squarely with the regulations promulgated by the President pursuant to his power to issue exceptions to Section 215(b). For 22 C.F.R. 53.3(b) authorizes departures without a passport to Western Hemisphere countries *only* if they are the traveler's ultimate destination. The proviso in that subsection makes the exception inapplicable if the traveler's destination is "a place outside the United States for which a valid passport is required" (p. 54, *infra*). Hence it must be the Department of State's view that Section 215(b) is applicable—because no exception authorizes departure without a passport—if a traveler uses a Western Hemisphere country as a mere way-station for travel to some other destination.

The Department's view that Section 215(b) applies to departures for destinations which violate area restrictions has been expressed in an endorsement placed on passports since January 1961. Following the stamp which lists the countries upon which area restrictions have been imposed, the following notice appears (LR. 22):

> A Person Who Travels To Or In The Listed Countries Or Areas May Be Liable For Prosecution Under Section 1185, Title 8, U.S. Code, And Section 1544, Title 18, U.S. Code.

This warning, we submit, formally expresses the view of the Executive department regarding the applicability of Section 215(b) and it puts travelers such as the defendants in these cases on notice that criminal sanctions are prescribed for their violations of area restrictions.

C. THE STATUTE AND REGULATIONS PROVIDE FAIR WARNING THAT VIOLATIONS OF AREA RESTRICTIONS ARE CRIMINALLY PUNISHABLE

The district court in *Laub* supported its conclusion that Section 215(b) did not reach the conduct alleged in the indictment and bill of particulars by invoking the doctrine that criminal statutes should be strictly construed (LR. 41–42). Petitioner Travis makes the related contention that Section 215(b), even if read together with the applicable regulations, is unconstitutionally vague as applied here because it fails to notify travelers that violations of area restrictions are criminally punishable (Travis Br. 36–45). However the argument is phrased, it appears to us to raise essentially the question of fair warning which

this Court considered recently in *Bouie* v. *City of Columbia*, 378 U.S. 347. We submit that the defendants in these cases, unlike the petitioners in *Bouie*, had more than ample notice that their conduct was impermissible. They were not engaging in totally innocent conduct which, but for an unexpected construction of a criminal statute, would not be subject to any punitive measures whatever.

It was stipulated that petitioner Travis knew of the applicable regulations and of the provisions of Section 215(b) (TR. 51). The appellees in *Laub* may fairly be presumed, on the allegations of this indictment, to have known of the restrictions on travel to Cuba and of the endorsement on their passports advising them that prosecution under Section 215(b) was a possibility. (See also the facts of the related case, LR. 11–13.) The fact that the defendants may have disagreed with State Department officials and believed, as the district court did in *Laub*, that Section 215(b) did not make their conduct criminal does not mean that they were not given fair warning. For they plainly knew that their violations of area restrictions might result in the revocation of their passports. Consequently, they were not taken by surprise. These cases are, therefore, quite unlike *Raley* v. *Ohio*, 360 U.S. 423, and *Kraus & Bros.* v. *United States*, 327 U.S. 614, where those who were convicted of crime had no reason for believing that they were engaging in anything other than wholly lawful conduct.

II

SECTION 215(b) MAY CONSTITUTIONALLY BE APPLIED TO VIOLATIONS OF AREA RESTRICTIONS

A. THE PROHIBITION UPON TRAVEL TO DESIGNATED AREAS DOES NOT VIOLATE THE FIRST OR FIFTH AMENDMENT

The basic constitutional issue was resolved by *Zemel* v. *Rusk*, 381 U.S. 1, in which this Court noted that the governmental power there being challenged—*i.e.*, the Secretary of State's refusal to validate a passport for a given geographic area—"acts as a deterrent to travel to that area." 381 U.S. at 14. The Court held that it was constitutionally permissible to impose governmental restrictions of this kind upon the "liberty" of travel protected by the Fifth Amendment because such restrictions rest upon "the weightiest considerations of national security." 381 U.S. at 14–16. The Court also held that no First Amendment right was at issue because the inhibition on travel to Cuba (or other geographically restricted areas) "is an inhibition of action" (381 U.S. at 16) and not of speech. Those conclusions fully control this case and answer the First and Fifth Amendment challenges to Section 215(b)'s effective prohibition on travel to Cuba (Travis Br. 58–61).

There is no substance to petitioner Travis' claim that this case involves different questions under the First and Fifth Amendments because it imposes a criminal penalty, and does not merely authorize the withdrawal of governmental assurances of safe passage. So far as the First Amendment is concerned, this Court's conclusion in *Zemel* that no First

Amendment right is involved is as applicable to a criminal prohibition as to a civil inhibition. As for the Fifth Amendment claim, the considerations which led this court to conclude that travel to Cuba may be deterred in the interests of national security also support the conclusion that a criminal sanction is permissible. Indeed, there was no suggestion in *Zemel* that the absence of a criminal sanction in the statute there at issue affected the Court's determination of the constitutional claim. Compare, for example, *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402.

Petitioner Travis also attacks the Secretary's discretion to authorize travel to Cuba in individual cases on the ground that this confers on the Secretary a "censorial" power in the First Amendment area (Travis Br. 62–64). This contention is unsound. The Court held in *Zemel* that travel to a foreign country is not a right protected by the First Amendment; consequently, the Secretary is not licensing speech when he determines who may and who may not travel to Cuba. Nor is there any basis for assuming that the Secretary has used his discretion to inhibit free speech by granting permission only to those who express certain views. The authorization to endorse passports as valid for travel to Cuba is merely a recognition of the fact that, notwithstanding the general policy of deterring travel to that country, there may be instances when travel should be permitted. In the absence of any showing that the discretion is being abused, there is no constitutional flaw in the conferral of such power on the Secretary.

B. SECTION 215(b) DOES NOT IMPERMISSIBLY DELEGATE LEGISLATIVE POWER

Petitioner Travis argues that Section 215(b) is unconstitutional because it delegates broad legislative power to the Executive (Travis Br. 54–58). The basic delegation claim was fully answered by this Court in *Zemel* v. *Rusk*, 381 U.S. 1, 17–18, where a grant to the Executive of even more general statutory authority was deemed constitutionally permissible in the area of contemporary international relations because of its "changeable and explosive nature." 381 U.S. at 17. That consideration applies fully here. See, also, *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109–110; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 324.

The claim that the broad authority which has always been thought permissible in the area of foreign relations is not appropriate when a criminal statute is involved (Travis Br. 54–55) is beside the point. For in this statute Congress did not delegate to the Secretary the power to *create* a crime. Congress defined the crime—departing the United States without a valid passport—and left to the Department of State the details concerning a passport's validity.

Nor is there substance to the claim that Section 215(b), unlike Section 211a of Passport Act of 1926, did not adopt the prior administrative practice as a standard by which to define the powers it delegated (Travis Br. 56–58). The statute involved in this case was enacted more than a quarter of a century after the provision construed in *Zemel*, and its "content" may also be taken "from history." 381 U.S. at 18.

To the extent, in other words, that Section 215(b) empowers the Executive to make "limitations and exceptions" and to the extent that it authorizes area restrictions, they must be of the same kind as those with which Congress was acquainted in 1952. Whether or not the Department of State had specifically focused on the imposition of criminal penalties for violations of area restrictions prior to 1952 is irrelevant. By requiring "valid" passports as a condition of departure Congress was empowering the Secretary of State to continue to impose such conditions and restrictions upon the validity of a passport as he had therefore imposed. And area restrictions were, as we have shown, among those with which Congress was well acquainted.

III

THE FAILURE TO CITE SECTION 215(b) IN THE PROMULGATING CLAUSE OF THE "EXCLUDING CUBA" REGULATION DID NOT MAKE THE STATUTE INAPPLICABLE

Petitioner Travis contends that she could not be criminally prosecuted for having traveled to Cuba because Section 215(b), the statute providing the criminal sanction, was not cited by the Secretary in the promulgating clause of the "Excluding Cuba" regulation. Petitioner's contention is that Section 215(c) authorizes criminal punishment only for the violation of the statute itself or of regulations issued "thereunder" (p. 47, *infra*). Since the "Excluding Cuba" regulation was allegedly not issued "under" Section 215, it is argued that travel to Cuba could not be a crime (Travis Br. 46–54). There are two answers to this argument.

First, petitioner errs in assuming that she was convicted of having violated a regulation. As her indictment demonstrates, she was accused of having violated the statute itself—Section 215(b)—by having departed the United States without a valid passport (TR. 1–2). Our theory is (pp. 11–15, *supra*) that one element of the passport's validity was whether travel to petitioner's destination had been authorized. Section 215 does not require that the Secretary expressly invoke that provision whenever he establishes standards by which passports are validated. If, for example, a citizen of the United States departs with an unsigned or expired passport or with one from which his photograph was missing, he would be violating the statute because his passport is invalid at the time of his departure. It would hardly be a defense to a prosecution under Section 215(b) that the Secretary did not invoke that statute when he made the traveler's signature a condition of a passport's validity.

A reading of the whole statute, including Section 215(a), demonstrates that when Section 215(c) speaks of violations of regulations it is referring not to the standards of validity which the Secretary prescribes but to the regulations under which aliens are permitted to enter and depart from the United States under Section 215(a)(1) (p. 46, *infra*). That clause delegates broad power to the Executive to establish the rules for such departure and entry, and it is for violation of these rules that Section 215(c)'s provision concerning "permit[s], rule[s], or regula-

tion[s] issued thereunder" provides a criminal sanction. This language is inapplicable to petitioner; the Secretary was not required, in other words, to act under the authority of Section 215 in establishing standards of validity for citizens' passports.

Second, even if petitioner's offense is viewed as a violation of a regulation which must, to be punishable under Section 215, be specifically promulgated under the authority of that section, there was sufficient reliance on Section 215 in the official notice of the "Excluding Cuba" regulation to make the statute applicable. As printed in the Federal Register (26 F.R. 482), the official reporter of governmental regulation, an express reference to "Sec. 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004" follows the text of the amended regulations. Reference is also made to Section 215 in the amended regulation as printed in 22 C.F.R. 53.3 (pocket supplement). That this reference appears in parentheses and smaller type is attributable to printing form and cannot be taken as proof that the Secretary of State did not rely on Section 215 in framing the regulation. The Rules of the Code of Federal Regulations specifically provide that this form should be followed in designating the authority for an individual section of the Code (1 C.F.R. xxvi):

> In general, each section of the Code is followed by a citation of statutory authority under which the section was issued * * * The authority for an individual section is designated by enclosure in parentheses at the end of the section.

The Code also makes this provision applicable to the printing of regulations in the Federal Register (1 C.F.R. (1965) 17.50):

> Authority covering a single section shall be cited in parentheses on a separate line immediately following the text of the section. * * *

Thus, although Section 215 does not appear in the public notice or press release issued by the Secretary of State, it is expressly set out in both official publications of government regulations.

IV

A STATE OF NATIONAL EMERGENCY HAD BEEN DECLARED AND IT EXISTED AT THE TIME OF PETITIONER TRAVIS' DEPARTURES

Section 215 applies, by its terms, only during a war or national emergency and after a finding and proclamation by the President "that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States * * *" (p. 45, *infra*). A national emergency was declared by the President on December 16, 1950 (Presidential Proclamation No. 2914, pp. 49-50, *infra*), and on January 17, 1953, the President issued Presidential Proclamation No. 3004, in which he found that additional restrictions and prohibitions upon the departure of persons from and entry into the United States was required by the national emergency (pp. 50-53, *infra*). The proclamation subjected the departure and entry of citizens to the regulations of the Secretary of

State, who was authorized "to revoke, modify or amend such regulations as he may find the interests of the United States to require" (pp. 52–53, *infra*).

There is no merit whatever to petitioner Travis' contention that the latter proclamation was inadequate because it failed specifically to advert to the need for geographic area restrictions (Travis Br. 65–66). As we have previously noted (p. 25, *supra*), area restrictions upon travel to eight Iron Curtain countries had been imposed in May 1952. When the proclamation of January 17, 1953 was issued, its reference to additional "restrictions and prohibitions" must have been intended to include the area limitations which had only recently been felt necessary as well as any other reasonable regulation the Secretary might impose. In any event, the statute did not require the President to enumerate in detail the kinds of restrictions he believed appropriate; the "trigger" which brings Section 215 into play is merely the finding and announcement that added restrictions are needed.

Petitioner Travis also contends that notwithstanding the President's failure to repeal either of the two proclamations and the statute's directive that its limitations apply "until otherwise ordered by the President or the Congress" (p. 46, *infra*), this Court should presently re-examine the basis for the finding of national emergency and determine that it no longer exists (Travis Br. 66–69). The statute, however, expressly confers authority to terminate the state of emergency (insofar as it relates to Section 215) only upon the President and Congress; the courts are as-

signed no role in that regard. Moreover, determinations such as these, involving an evaluation of the international political scene, have always been thought to be exclusively a matter for the Executive. See *United States* v. *Curtis-Wright Corp.*, 299 U.S. 304; *United States* v. *Belmont*, 301 U.S. 324; *United States* v. *Pink*, 315 U.S. 203; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103.*

V

PETITIONER TRAVIS VIOLATED SECTION 215(b) EVEN THOUGH SHE DID NOT OBTAIN CUBA'S PERMISSION TO ENTER THAT COUNTRY UNTIL AFTER HER DEPARTURES FROM THE UNITED STATES

There is, finally, no substance to petitioner Travis' contention that Section 215(b) did not apply to her departure because she did not, as of the moment when she crossed the border, have Cuba's consent to her entry into that country (Travis Br. 69–72). As we have indicated above (pp. 26–27, *supra*), we believe that Section 215(b) makes it a criminal offense to depart from the United States with the intention of traveling, either immediately or ultimately, to a destination to which one's passport is not valid, and thereafter to enter that foreign country. The traveler's

* We also note that the continued existence of the national emergency has been reaffirmed by Presidents since the Korean War. On November 29, 1960, President Eisenhower issued Executive Order No. 10896 (3 C.F.R. (1960 Supp.) 89) and on July 24, 1962, President Kennedy issued Executive Order No. 11037 (3 C.F.R. (1962 Supp.) 230). Both Orders refer to the continued existence of the national emergency proclaimed by President Truman in Proclamation 2914 of December 16, 1950.

practical obstacles or restrictions imposed by foreign law do not bear on this offense. If petitioner were able to avoid Section 215(b) on the ground that Cuba had not yet given its consent when she departed the United States, another traveler would similarly be able to claim that, as of the time of his departure, he did not yet possess the funds which enabled him to travel to Cuba (although he had every intention of earning them during his travels).[10] Obviously such circumstances are not a defense because the gravamen of the crime is departure with a specific intent—which petitioner concededly had (TR. 50–51). The subsequent entry into the foreign country may be an essential element, but how probable it was at the time of departure is no part of the offense.

The only authority cited to support petitioner's argument is *Heikkinen* v. *United States*, 355 U.S. 273. But in that case the Court holding that there can be no wilful *failure* to depart the United States until the country willing to receive the alien is identified. Petitioner erroneously attemps to draw from the *Heikkinen* case the negative inference that one cannot wilfully depart from the United States until a country has officially agreed to receive him. Wilful failure to depart and wilful departure are entirely

[10] Similarly, American citizens could resort to the same argument if they used Canada as a waystation for travel to Europe—to which a passport is required. It would be an obvious evasion of 22 C.F.R. 53.3(b) if a citizen could delay requesting a visa for a European country until he had arrived in Canada without a passport, and then contend that since he was unable to enter Europe without a visa until he arrived in Canada his departure—albeit with the necessary intent—was not a violation of Section 215(b).

different. One cannot wilfully fail to depart when he has nowhere to go, but he can wilfully depart, without a valid passport, regardless of whether the country of his destination has formally guaranteed acceptance prior to his departure.

We also note, with respect to petitioner Travis, that there is substantial doubt in the present state of the record whether she possessed any passport at all on her departures from the United States. The stipulation states only that she did not, at the pertinent times, "bear a valid United States passport specifically endorsed for travel to the Republic of Cuba" (TR. 51). It does not disclose whether she had an otherwise valid passport or whether she had none. The district judge in *Laub* said that he had been advised that she did not possess *any* unexpired passport (LR. 24), and we have been advised that she possessed a revoked passport (see note 2, *supra*, p. 5).

Whether petitioner possessed any passport at all is irrelevant to the principal issue presented by these cases since, if we are right, citizens who possess an otherwise valid passport which is invalid for Cuba are in no different posture with respect to departures for Cuba than citizens who possess no passport at all. But if the Court should disagree, it would not follow that departures for restricted areas are not punishable by Section 215(b) if the departing traveler bears no passport whatever. Petitioner was plainly no more privileged to travel to Havana without an unexpired and unrevoked passport then to travel to Paris. It is stipulated that she had knowledge of the "Excluding Cuba" regulation (TR. 51). Consequently, she

knew that Cuba was not one of the Western Hemisphere countries to which travel without a passport is permitted. Even if, contrary to our principal argument, she could not be criminally punished for violating the area restriction imposed on Cuba, she could be punished for leaving for that ultimate destination—for which the President provided no "exceptions"—without possessing an unrevoked or unexpired passport.

The stipulation is, as we have noted, unclear. In these circumstances, even if the Court were to agree with the district court in *Laub*, we believe it would be appropriate for the Travis case to be remanded under 28 U.S.C. 2106—either for further proceedings in which the meaning of the stipulation could be clarified or for a new trial on the indictment. *Bryan* v. *United States*, 338 U.S. 552.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in No. 67 should be affirmed and the judgment in No. 176 should be reversed and the case remanded for trial.

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SEPTEMBER 1966.

APPENDIX

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS

The Act of July 3, 1926, § 1, 44 Stat. 887, 22 U.S.C. 211a, provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insural possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, provides, in pertinent part, as follows:

> TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY—RESTRICTIONS AND PROHIBITIONS ON ALIENS
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of per-

sons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence or permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

Section 156 of 5 U.S.C. provides as follows:

Management of foreign affairs. The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business

of the department in such manner as the President shall direct.

Executive Order No. 7856 of 1938, March 31, 1938, 3 Fed. Reg. 681, 22 C.F.R. 51.75–51.77, reads, in pertinent part, as follows:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a pasport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, provides, in pertinent part, as follows:

A Proclamation

Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

Whereas world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, "Control of Persons Leaving or Entering the United States By the President of the United States," provides, in pertinent part, as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163,

190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW THEREFORE, I HARRY S TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such

regulations as he may find the interests of the United States to require.

* * * * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

* * * * *

Sections 53.1–53.8 of 22 C.F.R. provide, in pertinent part, as follows:

"Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency

AMERICAN CITIZENS AND NATIONALS

§ 53.1 *Definition of the term "United States".* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 *Limitations upon travel.* No citizen of the United States or person who owes alle-

giance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3

§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided*, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also*, That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: *Provided*, That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

* * * * *

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United

States, as defined in § 53.1. The fee for granting an exception under this subsection is $25.

* * * * *

§ 53.5 *Prevention of departure from or entry into the United States.* * * *

§ 53.6 *Attempt of a citizen or national to enter without a valid passport.* * * *

* * * * *

§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

Public Notice 179, 26 Fed. Reg. 492, promulgated on January 16, 1961, provides:

"DEPARTMENT OF STATE
[Public Notice 179]
United States Citizens
Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in

Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

* * * * *

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for Administration."

Press Release No. 24, issued by the Secretary of State on January 16, 1961, provides:

PRESS RELEASE NO. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 67

HELEN MAXINE LEVI TRAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

Stricty Construed, as It Must Be, Section 1185 Does Not Provide Criminal Sanctions for Area Travel Restrictions.

The Government urges that the requirement in Section 1185 of a "valid" passport for departure vests in the Department the substantive power to *prohibit* travel to designated geographical areas. This on the theory that the passport is "valid" only for such travel as the Secretary authorizes. It is petitioner's thesis that, whatever else "valid" encompasses, it does not include the power to forbid travel to designated areas on pain of criminal penalties. The explicit statements of the legislation's sponsors in 1918, 1941 and 1952 exclude such a purpose as the Government here imputes to the Congress. The language employed in the statutes was

sufficient to attain the limited objectives voiced by those sponsors, while it is silent on the question of prohibiting travel geographically or by destination. But most important the administrative expertise of the Department of State in effectuating the statute (not the *post litem motam* ingenuity of the Solicitor General in this litigation) has for many years consistently disclaimed such power of prohibition. If the historical approach to the "content" of a statute expounded in *Zemel* (381 U.S. at 18) is to be the basis for resolving the question of statutory construction here, the weight of the evidence greatly preponderates in petitioner's favor.

Under all of the Acts the Department of State consistently treated area restrictions upon passports as civil matters only, directed to withdrawing the request for safe passage, not as restrictions making travel criminal under any of the departure Acts. The Department's words and deeds to such effect over the many years concerned, supported on two occasions by Congressional reenactments of the departure legislation without expression of contrary or broader purpose, speak far more forcefully as to the fair meaning of the present statute than do the arguments for expanded purpose advanced now.

In support of its contention that "valid" under Section 1185 includes geographical limitations the Government (a) points to claimed administrative practices in 1914 and in 1940, preceding the 1918 and 1941 Acts respectively, under which the Department required passports to "set forth the specific countries to be visited and the purposes of the travel" (G. B. 22*), and urges

*Signifying Government Brief ("Brief for the United States"), page 22.

that Congress in passing those Acts must have had these practices in mind in requiring a "valid" passport to depart the country; and (b) points as well to 8 U.S.C. Sec. 1101(30), enacted with Section 1185 in 1952 as part of the Immigration and Nationality Act of 1952, defining a passport as a "document . . . which is valid for . . . entry . . . into a foreign country," and urges this definition *in se* imports recognition of area restrictions.

Neither proposition is well taken.

The Government points first to claimed wartime practices during World War I and World War II, preceding the 1918 and 1941 Acts, requiring that passports specify the countries to be visited and the "object of visit," and urges that while no mention of such practices or of any intention to limit departures to "valid" destinations appears in the Congressional debates or committee reports attending the passage of either of such Acts, it is "hardly probable" that Congress was "unaware" thereof. (G. B. 21.) The Government says:

> "Our argument with respect to the history of these acts rests . . . not on what legislative reports or debates expressly say. It is founded rather on the premises from which Congress must have proceeded when it passed the statutes of 1918, 1941 and 1952. On each occasion, the Department of State's passport policy was geographically restrictive: a passport was 'valid' only for certain destinations. In enacting Section 215(b) and its predecessors Congress must, we believe, have incorporated this standard of validity into the statute." (G. B. 25.)

But the Government concedes the 1918, 1941 and 1952 Acts "d[o] not in so many words, prohibit violations of area restrictions" but "spea[k] . . . [only] . . . in the language of 'border control statutes regulating departure from and entry into the United States.'" (G. B. 11.) The Government further concedes that "the debates on the floor of [Congress] do [not] show any awareness . . . by the sponsors of the legislation or those who questioned them of the problem [of area restrictions]." (G. B. 20.)

These are serious concessions. The debates on the 1918 and 1941 Acts were extensive, occupying as to the 1918 Act 24 pages in the Congressional Record, and as to the 1941 Act, 14 pages. (P. B. 24-25, fns. 7 and 9.*) Not only do these debates fail to "show any awareness" of any "problem" or need to criminally enforce area restrictions but they demonstrate affirmatively that Congress' "sole purpose" (1941 debates; P. B. 24) was to provide *border control* prohibitions upon entries or departures by "persons . . . engaged in espionage and subversive activities . . . [or] in activities inimical to the best interests of the United States"; there was *expressly disavowed* any purpose "to restrict or . . . in any way to impede the legitimate travel of citizens . . ." (*Id.*)

Moreover the Department overlooks completely the forceful circumstance that it itself consistently construed the 1918 and 1941 Acts, by contemporaneous constructions, as *not* lending criminal sanctions to area restrictions. As related in defendant's Opening Brief the Department issued five separate area restrictions during the operative periods of the 1918 and 1941

*Signifying Petitioner's Brief ("Brief for Petitioner"), pages 24-25, footnotes 7 and 9.

Acts and in not one did it say—or even suggest—that violations of such restrictions could be criminally punishable under either of such Acts. (P. B. 25-28.)

Thus though the Department urges now that Congress in enacting the 1918 Act "must . . . have incorporated" area restrictions "into the statute" because of prior "geographically restrictive" passport practices, the Department took no such view of the Act in 1919 when, virtually contemporaneously with the passage of that statute, it issued its area restriction of that year as to travel to Germany. There, so far from suggesting that the 1918 Act could criminally punish mere departure for Germany, the Department, while announcing it was no longer "issuing or authorizing issuance . . . of passports for Germany," affirmatively declared that it "interposes no objection" to travel there without a passport by any person with "important . . . business," though "such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions." (3 Hackworth, Digest of International Law, 530; P. B. 26-27.) This is clearly not language of criminal prohibition, such as would apply if the 1918 Act were conceived to make area restrictions penal, but language merely of civil withdrawal of the safe-passage passport functions. In this restriction and the four other area restrictions announced during the periods of the 1918 and 1941 Acts, the Department, contrary to what it now sees so clearly as the meaning Congress "must have" intended, plainly conceived area restrictions despite those Acts in purely civil, not criminal, terms.

Moreover at the critical time at bar of Congress' consideration in June 1952 of Section 1185, Congress had before it the particularly explicit May 1, 1952 Department statement declaring that the Department's area restriction issued that day as to travel to East European countries, China and the Soviet Union *"in no way forbids"* travel to such countries, but amounts merely to a "taking [of] additional steps to warn American citizens of the risks of travel in . . . [such] countries." (26 Dept. St. Bull. 736; P. B. 27.) This despite the fact that the 1941 Act was then in full force and effect. The Department could not have more clearly advised Congress that the requirement of a "valid" passport for departures under the criminal prohibitions of the 1941 Act was not construed to lend criminal sanctions to area restrictions. This declaration was issued, as the Department observes in its brief, "in May 1952—one month before the enactment of [Section 1185]" (G. B. 25); it is, therefore, as the Department concedes, plainly "relevant in determining Congress' understanding of the term 'valid passport.'" (*Id.*)

The Government's brief makes no comment on the foregoing forceful evidence of administrative construction of the predecessor 1941 Act occurring immediately before that Act's reenactment as Section 1185, but turns instead to a passing statutory definition of a "passport" in the 1952 Immigration and Nationality Act, of which Section 1185 was part. That definition (8 U.S.C. Sec. 1101(30)) recites that a passport means "any travel document issued by competent authority" which is "valid for . . . entry . . . into a foreign country." But that definition imports no recognition of area restrictions as conditions upon "valid" passports.

The reference "valid for . . . entry . . . into a foreign country" is merely a *generic* description of the "foreign travel" characteristic of passports. It says no more than that passports are designed for *foreign* travel, not for domestic travel or usages. Had Congress truly meant to make area restrictions conditions of departure under Section 1185 (in the face of the consistent administrative construction to the contrary under the predecessor statutes), Congress could readily have defined a passport explicitly as a document "valid for entry into the country or countries which is/are the bearer's destination." Congress did not do so and the reference used, "valid for . . . entry . . . into a foreign country," imports merely "valid" for "foreign" travel *generically*.

Moreover, if the definition be read as bearing any measure of implication that Section 1185 was intended to provide criminal sanctions for area travel restrictions, there must be offset against such consideration in any event not only the prior contrary administrative construction under the 1918 and 1941 predecessor Acts as heretofore described, but continuing and even more impressive contrary administrative construction under Section 1185 itself. Prior to the restriction as to travel to Cuba involved at bar, the Department since enactment of Section 1185 had issued three area restrictions (P. B. 28-29); all of these sounded in civil, safe-passage terms only, and none so much as mentions Section 1185. Moreover, the Department has conceded that "approximately 600" persons have violated area restrictions since the enactment of Section 1185, yet the cases at bar, and the *Worthy* prosecution for entry, represent the first attempts by the Department ever to prosecute per-

sons under Section 1185 for claimed violations of area restrictions. (P. B. 32.)

Additionally, questioned on the very issue by the Senate Foreign Relations Committee in 1957, the Department in a considered statement officially advised the Committee that travel to an area restricted country *in se* violates *no criminal law.* (P. B. 30-31.) The Committee asked the Department, "What does it mean when a passport is stamped 'not valid to go to country X'?" Does this mean, the Committee asked, merely that the United States "withdraws its protection" from such travel, *or* does it mean the United States "prohibits the person from going to country X?" After two months of careful study the Department replied that such a stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be violating the criminal law.*" (P. B. 31.) The Department said there were criminal laws "which might well be violated *in the course* of such travel", mentioning "e.g. The Trading With The Enemy Act," and, additionally, such travel might lead to the denial of a future passport and might raise questions as to whether "false statements" had been made in obtaining the passport in question. But the mere travel to the area-restricted country *in se* would be *no crime.* No mention or citation was made of Section 1185 as even relevant to the issues posed, despite the thorough canvass of the law.

There would seem to be no doubt that had the Department in thus communicating its considered views to the Senate Committee truly conceived that Section

1185 applied to make criminal a mere leaving of the United States to go to "country X", it would have said so. What it said, and did not say, bears eloquent witness to its then belief that Section 1185 did not apply to violations of area travel restrictions.*

In its brief the Department attempts to urge (G. B. 28, fn. 8) its 1957 statement to the Senate Committee "is not inconsistent" with its present position that Section 1185 makes area restrictions penal because (a) Section 1185 "applies only in times of war or emergency", hence the Department "was right" in advising that travel to a restricted country is not "necessarily" criminal since it is not criminal "if there is no national emergency in effect", and (b) a traveler to a restricted country would not violate Section 1185 "if he forms the intention of going [to such country] after he has left the United States." But as to argument (a) the required "national emergency" has been proclaimed and in effect at all times since January 17, 1953 (P. B. 5, fn. 1) and was in full effect when the Department responded to the Committee in 1957, and as to argument (b) the likelihood of a person's arriving at the described intent only after departure from the United States makes the Department's remark no more than a qualification on a general principle. Clearly any reasonable approach of candor to the Senate Committee would

*This administrative construction by the Department that Section 1185 is inapplicable and irrelevant to travel in violation of area restrictions was repeated, moreover, in the passport form issued by the Department prior to January 1961. We are informed, and we believe the Government will not question, that prior to January 1961 the passport form issued by the Department listed the restricted areas and followed these only by an admonition warning of possible prosecution under 18 U.S.C. Sec. 1544 for improper "use" of the passport contrary to any restrictions or conditions, but without any reference at all to Section 1185.

have required the Department, if it believed Section 1185 made criminal a mere leaving for a restricted country, to say so and to add as but possible qualifying exceptions the matters it now raises in "explanation" for not stating any applicability of Section 1185 at all.

Finally the Department would deprecate the significance of the call by the President himself in 1958 for new legislation to criminally prohibit area restricted travel and the Department's drafting and submission to Congress of bills to such effect and Congress' nonaction thereon. (P. B. 33-34.) The Department would discount this climaxing administrative construction indicating inapplicability of Section 1185 by citing four *civil* cases to the effect that "public policy" requires that administrative agencies be free "to ask legislation which will terminate or avoid adverse contentions and litigations" and that "requests by government agencies and the resulting nonaction of Congress" should not be construed "as affirmative evidence of no authority." But the four cited and quoted cases, *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597; *Wong Yang Sung v. McGrath*, 339 U.S. 33; *United States v. du-Pont and Co.*, 353 U.S. 586 and *United States v. Philadelphia National Bank*, 374 U.S. 321, all dealt with *civil* proceedings wherein the issue was the proper interpretation of *civil statutes* only. Thus the *Dean Foods Co.* case dealt with administrative standing to invoke appellate judicial relief under the All Writs Act, 28 U.S.C., Section 1651(a); the *Wong Yang Sung* case dealt with the applicability of the Administrative Procedure Act to deportation proceedings; and the *du-Pont* and *Philadelphia National Bank* cases dealt with civil injunction proceedings to set aside stock acquisi-

tions claimedly invalid (but not criminal) under Section 7 of the Clayton Act, 15 U.S.C., Section 18.

Involved at bar is a *criminal* cause. At issue is the proper construction of Section 1185 as a *criminal statute*. The President's and the Department's requests of Congress at bar for new legislation to criminally prohibit area-restricted travel express executive construction of Section 1185 as not already providing such criminal restraint, or at least as not doing so clearly. What is important is not Congress' inaction *in se* but the continuing administrative construction of Section 1185 as not lending criminal sanctions to area restrictions. This continuing construction, climaxing many years of administrative words and acts to like import as heretofore seen, demonstrates, it is submitted, that Section 1185 is at least ambiguous as to prohibiting area restricted travel, and it is at least a reasonable reading of the statute to exclude such prohibiting effect. For the purposes of a criminal statute this should be decisive. If two readings of a criminal statute are plausible and reasonable, one favoring innocence and the other guilt, the rule of strict construction would appear to require that the "narrow" construction favoring innocence be adopted. (*Yates v. United States,* 354 U.S. 298, 310; *Harrison v. Vose,* 50 U.S. (9 How.) 372, 378; *Bell v. United States,* 349 U.S. 81, 83-84; *Heflin v. United States,* 358 U.S. 415, 419; *Ladner v. United States,* 358 U.S. 169, 177-178; *Kraus & Bros., Inc. v. United States,* 327 U.S. 614, 626; *United States v. Wiltburger,* 18 U.S. (5 Wheat.) 76, 93.) And particularly should this be the case where the interpretation favoring innocence is supported by so impressive a history of administrative practice and construction as that demonstrated at bar.

II.

To Uphold Section 1185 as Sanctioning Criminal Punishment in the Premises at Bar Would Violate Due Process for Vagueness, Contradiction and Misleading Terms in the Communication of a Criminal Command.

Defendant has urged that in light of the many explicit and implicit implications by the Government prior to the instant prosecution that its area travel restrictions were noncriminal in nature (climaxed by the circumstance that the Regulation at bar was expressly promulgated only under the *civil* Act of July 3, 1926 and the further circumstance that the Press Release and Public Notice accompanying the Regulation sound only in civil, safe-passage terms), to sustain prosecution at bar would offend due process for vagueness, contradiction and misleading terms in the communication of a criminal command.

The Government has replied only that it was "stipulated" that defendant "knew of the applicable regulation and of the provisions of Section 215(b)." (G. B. 32.) The true stipulation was only that defendant "knew the provisions" of the statute and of "Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations." [R. 51.] This does not at all stipulate to knowledge of the *meaning* or *effect* of the statute or Regulation as claimed now by the Government. It means defendant knew the terms and contents of the statute and of the Excluding Cuba Regulation. But that knowledge is only the beginning of the problem as to the presence or absence of fair notice. The regulation was expressly promulgated not under Section 1185 but only under the Act of July 3, 1926, a civil statute providing no

criminal punishment for violations of regulations issued under it. Additionally, Public Notice 179 accompanying the Regulation repeated this civil promulgative authority, and both it and Press Release No. 24, also accompanying the Regulation, sounded in civil, safe-passage terms only. The Press Release in particular explained the withdrawal of passport rights for travel to Cuba as being due to the Government's "inability . . . to extend normal protective services to Americans visiting Cuba." (P. B., App. E.)

Moreover, most significant is what the Regulation, Press Release and Public Notice did *not* say. No word of warning is expressed in any of them that criminal sanctions under Section 1185 may be brought to bear to enforce the area restriction as to travel to Cuba. In light of the many years of administrative construction that area restrictions were not criminal in nature, and in light particularly of the explicit 1952 statement of the Department that such restrictions "in no way forbid" affected travel and the 1957 statement by the Department that travel *in se* to area restricted countries constitutes *no crime,* it is indefensible for the Government in 1961 in promulgating the Cuban travel restriction not to specify and clearly state the consequence of criminal punishment under Section 1185 for any travel in breach of the new restriction if it intended subsequently to urge such punishability. To fail to give such warning in the light of such premises of confusion and contradiction was to violate fair dealing.

The Department further suggests that there can be no legitimate complaint of want of fair warning because citizens "plainly knew" that violations of area restrictions "might result in the revocation of their pass-

ports." (G. B. 32.) But knowledge of the possibility of civil disadvantage or penalty is no substitute for reasonable fair warning of potential *criminal punishment*. To merely state the contrary contention is to refute it.

Finally the Department declares that all passports "since January 1961" have borne a stamp listing "countries upon which area restrictions have been imposed" and an explicit warning to the bearer that, "A person who travels to or in the listed countries may be liable for prosecution under Section 1185, Title 8, U.S. Code, and Section 1544, Title 18, U.S. Code." (G. B. 31.) What the Government does not add is that prior to January 1961, as heretofore noted, passports had for years borne the same listing of area restricted countries followed *only* by an admonition relating to possible prosecution under 18 U.S.C., Section 1544 for improper "use" of the passport contrary to any restrictions or conditions, but *without any mention of Section 1185 as being even relevant*. Thus until January 1961 the official passport form adopted by the Department failed to warn of any criminal enforceability of area restrictions under Section 1185, and, indeed, by omission strongly indicated the precise contrary. The Government has not shown defendant had a post-1961 passport form and not a pre-1961 form. Hence it cannot rely on the 1961 form to cure want of fair notice. The form for passports is not a matter chargeable by constructive notice, and particularly not in a criminal cause.

III.

Questions Relating to Delegation of Legislative Power and to Personal Liberty and Freedom of Speech, Thought and Association.

The Government urges *Zemel v. Rusk* is dispositive at bar as to defendant's claims of improper delegation of legislative powers and of denials of personal liberty and of freedom of speech, thought and association, contending the attempt at bar to impose criminal sanctions upon violations of area restrictions raises no "basic" new issues. (G. B. 33-36.) Defendant here renews her Constitutional claims and notes that in the particulars and for the reasons already stated in her Opening Brief the differences between criminal penalties and merely civil consequences can be, and at bar should be held to be, dispositive in favor of private rights and liberties within the Constitutional areas concerned, and defendant incorporates those prior statements here without repeating them.

One aspect of the Government's discussion as to freedom of speech calls for special comment. Defendant urged in her Opening Brief (P. B. 62-64) that the Excluding Cuba Regulation grants the Secretary unconstitutional *censorial, discretionary power* as to freedom of travel to Cuba because empowering him to permit or deny such travel as he finds the same to be "in the best interests of the United States." (Press Release No. 24; P. B. 62 and App. E.) The Government argues *Zemel v. Rusk* has determined "that travel . . . is not a right protected by the First Amendment; con-

sequently, the Secretary is not licensing speech when he determines who may and may not travel to Cuba." (G. B. 34.)

But this assertion cuts too broadly. This Court has said liberty of travel is a freedom "closely related to rights of free speech and association" (*Aptheker v. Secretary of State,* 378 U.S. 500, 517), and has recognized, with Chafee, that "in many different ways . . . [it] contributes to sounder [democratic] decisions." (*Kent v. Dulles,* 357 U.S. 116, 127.) If the right to travel is not assimilable fully within freedom of speech it is, like public picketing, at least a right closely related to liberty of speech and embracing that liberty within it at least in some important part. This Court has recognized that picketing, because it "is inseparably something more" than pure free speech, is subject to some regulation not permissible as to free speech alone. (*Hughes v. Superior Court,* 339 U.S. 460, 464.) But no one would suggest that picketing could be licensed by government and subjected to censorial, discretionary suppressive control such as is condemned in *Cox v. Louisiana,* 379 U.S. 536, 557 and the related free speech censorial-control basis cited in defendant's Opening Brief at pages 62-63. It is the same with the right to travel. It partakes enough of pure freedom of speech, thought and association to be Constitutionally immune from censorial licensing power such as that created at bar by the Excluding Cuba Regulation.

As to the question of delegation of legislative powers the Government urges the rule requiring that delega-

tions relating to criminal statutes be judged with particular strictness is inapplicable at bar because "Congress did not delegate . . . the power to *create* a crime" but itself "defined the crime—departing the United States without a valid passport—and left to the Department . . . [only] the details concerning a passport's validity." (G. B. 35.) But whether area restrictions are to be constituted *criminal prohibitions* on travel is not a "detail concerning a passport's validity" but a vital question of *policy,* and one, moreover, not resolved by Congress in favor of criminal restraint. What has been said heretofore and in defendant's Opening Brief concerning the legislative history and administrative practices under the three departure statutes combines to make it plain that the policy question of whether to place criminal restraint upon travel to area-restricted countries was not considered or determined by Congress. As the Government concedes, the legislative record does not "show any awareness" by Congress "of this problem." (G. B. 20.) Accordingly when the Department attempted by the Excluding Cuba Regulation at bar both to require a passport under Section 1185 for travel to Cuba and to simultaneously prohibit the issuance of any passport for such travel, it did more than round out a "detail"—it created the substance and content of a new "crime". And this it did without guidance or control by adequate, or indeed any, legislative standards. It is just such administrative conduct which the Constitution condemns.

Conclusion.

Defendant reiterates without repeating all of the other considerations and points urged in her Opening Brief, and upon all of the grounds stated herein and in said Opening Brief respectfully urges that the judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1966.

Helen Maxine Levi Travis, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 10, 1967.]

Mr. Justice Fortas delivered the opinion of the Court.

This is a companion case to No. 176, *United States v. Laub, ante.* Petitioner was tried on a stipulation of facts, under an indictment which alleged that on two occasions she "did unlawfully, knowingly and willfully depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a valid passport is required" in violation of § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185 (b). The parties stipulated that "At no time pertinent or material herein did defendant, Helen Maxine Levi Travis, bear a valid United States passport specifically endorsed for travel to the Republic of Cuba . . . ." This stipulation is all that the record in this case reveals as to petitioner's possession of a valid passport. Petitioner was convicted, and the Court of Appeals affirmed. We granted certiorari in light of the important questions raised by petitioner, and the apparent conflict with the decision of the District Court for the Southern District of New York in the *Laub* case, *ante*, which we affirm today.

As our decision in *Laub* determines, if petitioner in fact had a valid passport, and the gravamen of the Government's accusation under § 215 (b) were that her passport was not valid for travel to Cuba, this conviction

could not stand. We have today held that area restrictions upon the use of an otherwise valid passport are not criminally enforceable under § 215 (b). Because the Government did not allege, and introduced no proof, that petitioner did not bear a valid passport on each of the occasions on which she departed for Cuba, via Mexico, our decision in *Laub, ante*, requires that her conviction be reversed.

Accordingly, the judgment of the Court of Appeals is

Reversed.